Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether this Court should resolve the three-way circuit conflict regarding whether a district court is forbidden to consider the circumstances of a defendant, including changed medical conditions, as they exist at the time of a resentencing.

(2) Whether the Seventh Circuit erred in holding—in avowed conflict with the Fifth Circuit—that 18 U.S.C. § 1014 criminalizes the making of false statements, unrelated to lending transactions, to federally insured institutions.

RULE 29.6 STATEMENT

Petitioner Robert R. Krilich, Sr., is a private party.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr. respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's decision affirming petitioner's conviction but vacating his sentence and remanding (App., *infra*, 10a-28a) is reported at 159 F.3d 1020 (7th Cir. 1998). The district court imposed petitioner's final sentence on a subsequent remand in an unreported order. App., *infra*, 3a-9a. The decision of the Seventh Circuit on appeal of that sentence *(id.* at 1a-2a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2002. See *id.* at 1a-2a. On January 27, 2003, the Seventh Circuit denied petitioner's request to rehear the case *en banc*. See *id.* at 29a-30a. By order dated April 18, 2003, this Court extended petitioner's time to file this petition to June 26, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1014 is entitled "Loan and credit applications generally; renewals and discounts; crop insurance," and makes it a crime to "knowingly make[] any false statement or report * * * for the purpose of influencing in any way the action of * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan."

STATEMENT

Petitioner seeks review of two legal rulings by the United States Court of Appeals for the Seventh Circuit. First, the court of appeals held that a district court, in resentencing a defendant, may not consider changed circumstances as they relate to any

issue decided on a prior appeal. In this case, the district court was deemed forbidden to consider the precipitous decline in petitioner's health because the court of appeals had previously addressed petitioner's entitlement to any health-related sentencing departure in a prior appeal. See App., *infra*, 1a-2a. The courts of appeals have adopted three conflicting standards: some forbid consideration of changed circumstances; others permit or even require it; and the Seventh Circuit alone permits considering changed circumstances only if the sentencing issue was not considered on a prior appeal.

Second, the Seventh Circuit majority held that 18 U.S.C. § 1014, which criminalizes the making of false statements to influence federally insured banking institutions, applies to "transactions other than loans." In reaching that conclusion over the dissent of Judge Ripple, the Seventh Circuit rejected the contrary holding of the Fifth Circuit, which refused to construe Section 1014 to prohibit essentially all false statements to lending institutions and thus to intrude on the traditional domain of state criminal law. It is undisputed that, in the Fifth Circuit, petitioner could not have been prosecuted under Section 1014.

1. Petitioner was convicted of fraud and conspiracy to violate RICO in connection with the issuance of industrial revenue bonds to finance petitioner's construction of approximately 1200 housing units. App., *infra*, 11a. Petitioner was sentenced to 64 months' imprisonment. At sentencing, the district court departed downward seven levels from the otherwise applicable Guidelines range because the estimated financial benefit to petitioner from his misconduct overstated the seriousness of his offense. *Id. at* 23a. Petitioner appealed his convictions, and the Government cross-appealed from the district court's downward departure at sentencing. The Seventh Circuit affirmed the convictions but vacated petitioner's sentence because the district court's benefit calculation was impermissibly vague. *Id.* at 26a-27a.

The court of appeals, *inter alia*, affirmed petitioner's conviction under 18 U.S.C. § 1014. The statute, entitled "Loan and credit applications generally," makes it a crime to

"knowingly make[] any false statement or report * * * for the purpose of influencing in any way the action of * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." Petitioner's conviction was based on the withdrawal of funds held in trust in the bank that petitioner had raised from the sale of Industrial Revenue Bonds to third parties. The court of appeals held that the statute criminalizes petitioner's conduct, even though "the withdrawals of the trust funds were not lending transactions" and despite the fact that the banks faced no financial exposure whatsoever because petitioner's statements involved the withdrawal of *third parties'* assets. App., *infra*, 19a-21a. The Seventh Circuit acknowledged the directly contrary holding of the Fifth Circuit in *United States* v. *Devoll*, 39 F.3d 575 (1994) (per Politz, C.J.), that Section 1014 "applies only to statements made to obtain loans or other extensions of credit," but rejected the reasoning of *Devoll*, concluding that the "text of the statute is straightforward and broad," and therefore resort to legislative history or the rule of lenity was unnecessary. App., *infra*, 19a-21a.

Judge Ripple dissented with respect to Section 1014. He would have adopted the Fifth Circuit's holding that Section 1014 "applies only to *lending activities* by the financial institutions protected by the statute." App., *infra*, 27a (emphasis added). According to Judge Ripple, this reading of the statute is dictated by "the Supreme Court's explicit determination" in *Williams* v. *United States*, 458 U.S. 279 (1982), that Section 1014 was intended to provide "'penalties for making false statements or reports in connection with loans or other similar transactions.'" Because the "funds held by the bank in this case involved no extension of credit," Judge Ripple would have found the statute "inapplicable." App., *infra*, 28a.[1/]

[1/] The court of appeals also rejected petitioner's contention that the use of a pre-trial proffer against him violated Fed. R. Evid. 410. App., *infra*, 12a-16a. The Seventh Circuit's holding has been rejected by at least one district court (see *United States* v. *Chaparro*, 181 F. Supp. 2d 323, 336 (S.D.N.Y. 2002) (recognizing the conflict)) and the question is now pending before the

2. Based on new findings on remand, the district court concluded that the applicable Guidelines range was 135 to 168 months. By the time of his resentencing in early 2000, however, petitioner's physical and mental health had declined. He accordingly sought a downward departure based on his advanced age (then 69, and now 72) and his deteriorating physical and psychological condition. See Krilich's Response to Presentence Investigation Rep. & Mem. in Aid of Sentence (1/26/00) at 23-29. The district court received medical evidence showing that appellant suffered from a series of serious infirmities. Dist. Ct. 11/1/00 Op. at 7. Invoking U.S.S.G. § 5H1.4, the court granted a five-level departure based specifically on petitioner's "four major illnesses"—"cardiovascular disease, peripheral vascular disease with hypertension, obstructive pulmonary disease and back disease/lumbar and lumbosacral origin." *Id.* at 10. With the departure, the court imposed a term of 87 months' imprisonment. *Id.* at 11.

3. Petitioner appealed from another aspect of the sentencing order, and the Government cross-appealed from the five-level downward departure. The Seventh Circuit held that the district court's decision to depart downward on the basis of petitioner's age and infirmity could not "be reconciled with" the Guidelines, including particularly Section 5H1.4, which limits departures to cases of "extraordinary physical impairment." *United States* v. *Krilich*, 257 F.3d 689, 693 (2001). Having rejected the basis for the district court's downward departure, the Court remanded the case with a specific mandate to resentence "in the range of 135 to 168 months." *Id.* at 694.

4. After the Seventh Circuit remanded, but prior to any resentencing proceedings, petitioner's health declined even more dramatically. In August 2001, petitioner suffered a nearly fatal acute atrial fibrillation (uncontrolled, rapid, and irregular heart rhythm). That condition arose because petitioner suffered

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Second Circuit. If a circuit conflict develops during the pendency of the petition, petitioner will move for leave to amend to present that question to this Court.

a severe bowel obstruction, producing "abdominal pain, nausea, vomiting, and inability to hold down liquids and medication." App., *infra*, 4a-5a. Prison officials did not treat the condition as serious, but inexplicably only gave him Pepto-Bismol. His condition deteriorated rapidly. 2/14/02 Tr. 59, 98-99, 149-151.

Petitioner suffers from numerous medical conditions, requiring an array of medications.[2/] His unchecked and untreated vomiting prevented him from keeping any of his medications down. His psychotic depression and attendant symptoms as a result became "increasingly severe." 2/14/02 Tr. at 14, 46-47. Even more critically, the vomiting left petitioner extremely dehydrated, placing great stress on his cardiovascular system and producing an acute atrial fibrillation. *Id.* at 98-100. Finally, FMC personnel took petitioner by ambulance to the intensive care unit at a local hospital. His cardiac rhythm was unstable but—after unsuccessful attempts by hospital personnel to shock his heart back to a stable beat—was ultimately normalized with medication. *Id.* at 98-99. The damage to petitioner's heart and cardiovascular system was permanent. App., *infra*, 5a. As hours of unrebutted medical testimony established, petitioner "sustained an irreversible and permanent predisposition to heart abnormalities in the future." 2/14/02 Tr. 99-100. He has "a much higher likelihood of a significant cardiac event, which would be a heart attack, an

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[2/] Petitioner now takes more than 20 medications for his various ailments, and at the time of his resentencing took at least 16: (1) Nitroglycerin (for angina); (2) Atenolol (for high blood pressure and angina); (3) Lisinopril (for high blood pressure); (4) Lovastatin (for high cholesterol and triglyceride levels); (5) Doxazosin Mesylate (for high blood pressure and benign prostatic hyperplasia); (6) Bupropion (for depression); (7) Paroxetine (for obsessive compulsive disorder, panic disorder, and social anxiety disorder); (8) Seroquil (antipsychotic agent for emotional or mood disorders); (9) Buspar (for depression); (10) Gabapentin (for seizures associated with epilepsy); (11) Levothyroxine Sodium (for hypothyroidism); (12) Timolol (for glaucoma); (13) Doxycycline (for adult periodontitis); (14) Potassium Chloride (for treating/preventing low blood potassium levels); (15) Albuterol Inhaler (for treating/preventing symptoms of asthma, emphysema, and other breathing conditions); and (16) Aspirin (for prevention of blood clots, heart attacks, and strokes). Mem. in Support of Motion for Downward Departure at 2-4 (and 10/23/01 Chronological Record of Medical Care, attached thereto).

arrhythmia, or heart failure." *Id.* at 106. "Witness what happened in August when he nearly died." *Id.* at 123.

Petitioner's heart condition is exacerbated by his worsening mental illness. Petitioner suffers from a major depressive disorder (which is psychotic from time to time), obsessive compulsive disorder, panic attacks, and severe anxiety. 2/14/02 Tr. 3, 10, 11. And, as noted, petitioner's inability to keep his medications down caused his psychotic depression to become "increasingly severe" (*id.* at 14, 46-47), aggravating his already serious heart problems (*id.* at 15).

The upshot is that petitioner has a drastically reduced life expectancy. The combination of petitioner's coronary disease and his severe depression will "substantially shorten" petitioner's life. 2/14/02 Tr. 116-118. The best estimate is that he had (at the time of the resentencing hearing) five (or at most eight) years to live, well below the life expectancy for men his age. *Id.* at 31, 34-36, 116-118.

The medical testimony also demonstrated that petitioner's imprisonment severely aggravates his condition. He "would be more effectively treated" outside of prison, where "[t]here would be better coordination between those physicians who are involved in his psychiatric [care] and those who are involved in his cardiac care or his general medical care. That kind of coordination is not occurring in the prison." 2/14/02 Tr. 43-44. By contrast, his "current environment * * * will lead to disastrous health consequences." *Id.* at 120.

5. Petitioner sought a downward sentencing departure on remand based on two Guidelines: his age and infirmity (§ 5H1.1) and his extraordinary physical impairment (§ 5H1.4). See Mem. in Support of Motion for Downward Departure at 4; 2/13/02 Tr. 31-33. The district court held a hearing on petitioner's motion for downward departure on February 14, 2002, limited to the intervening circumstances occurring "since August [2001]." 2/13/02 Tr. 32.

In reaching its sentencing decision, the district court credited the doctors' testimony that petitioner suffers from a severe cardiac condition and that the interplay between this

condition and petitioner's clinical depression would likely shorten his life. See 2/14/02 Tr. 175 ("Yes, depression plus serious heart illnesses will shorten his life span"). The court concluded, however, that petitioner had not shown that he would live any longer outside of prison. App., *infra*, 8a-9a. Petitioner accordingly failed to persuade the court that imprisonment would shorten his life span—something the district court believed was necessary to show an "extraordinary physical impairment" for a § 5H1.4 departure.

Critically, the district court held that its finding that petitioner lacked an "extraordinary physical impairment" under § 5H1.4 necessarily foreclosed relief for his "age and infirmity" under § 5H1.1. The court concluded that a defendant can be "infirm" under § 5H1.1 only if he has the sort of "extraordinary physical impairment" that qualifies for § 5H1.4 relief. See, *e.g.*, 2/14/02 Tr. 172. The district court thus believed that there was a single "showing that must be made to warrant a departure under [either of] these provisions." App., *infra*, 7a. The court concluded that, because appellant had not qualified for § 5H1.4 relief, he was also ineligible for a departure under § 5H1.1. 2/14/02 Tr. 168. The district court accordingly denied appellant's motion for downward departure and imposed a sentence of 135 months' imprisonment. *Id.* at 179-180.

6. On appeal, petitioner argued that the district court applied the wrong legal standard by subsuming the § 5H1.1 standard within § 5H1.4. Petitioner explained that the district court's holding misread the Seventh Circuit's previous decision in the case, ran afoul of well-entrenched canons of construction, and conflicted with decisions by the Seventh Circuit and other courts distinguishing between § 5H1.1 and § 5H1.4. The Seventh Circuit never addressed these arguments, however, holding that the district court lacked authority even to consider a downward departure based on petitioner's deteriorating health: "The last time the case was here, we concluded that the evidence did not warrant any reduction in sentence under U.S.S.G. §5H1.1 or §5H1.4." App., *infra*, 2a. The court's mandate on remand was "'to impose a sentence in the range of 135 to 168 months,'" and the district court therefore "had no authority to impose a sentence lower than the one

[petitioner] received." *Ibid.* (emphasis added). In the court of appeals' view, an intervening change in governing law might have justified broader proceedings on remand, *ibid.*, but an intervening change in fact did not.

After the Seventh Circuit denied rehearing and rehearing en banc (App., *infra*, 29a-30a), this Petition followed.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted to resolve two important conflicts among the courts of appeals. First, the Seventh Circuit in this case applied its rule, not followed by any other circuit, that a resentencing court may consider changed circumstances *only* if the circumstances do not bear on an issue already addressed by the court of appeals. The Fourth, Eighth, and Tenth Circuits take the more restrictive position that a district court on resentencing may consider only the facts as they stood at the time of the original sentencing, while the First, Second, Third, Fifth, Sixth, and D.C. Circuits hold that any changed circumstance may be considered by the resentencing court. Under the latter position, which is the correct view in light of this Court's precedents and the structure of the Sentencing Guidelines, petitioner would have been entitled to argue for, and ultimately to receive, a sentencing departure that accounts for the dramatic deterioration in his physical condition.

Second, the Seventh Circuit held that 18 U.S.C. § 1014, which governs "loan and credit applications," applies to statements made to federally insured banks in connection with transactions unrelated to lending. This position, subsequently adopted by the Sixth and Ninth Circuits, squarely conflicts with the holding of the Fifth Circuit in *United States* v. *Devoll*, 39 F.3d 575, 580 (1994), that under *Williams* v. *United States*, 458 U.S. 279 (1982), Section 1014 "applies only to actions involving lending transactions." Given that petitioner's conviction was based on transactions unrelated to a loan or credit application, the court of appeals' decision to reject *Devoll* was outcome determinative. Because the federal government is disabled by *Devoll* from bringing prosecutions in the Fifth Circuit asserting that Section 1014 was violated by statements unrelated to lending transactions, disparate treatment of

defendants under the statute is guaranteed absent this Court's intervention.

ARGUMENT

I. The Courts Of Appeals Are Hopelessly Divided Over District Courts' Authority To Consider Changed Circumstances At Resentencing.

This case squarely presents an issue that has deeply divided the courts of appeals—whether and when a district court may consider changed circumstances in resentencing a defendant. See generally *United States* v. *DeRiggi*, 893 F. Supp. 171, 180-181 (E.D.N.Y.) (noting circuit split), aff'd, 72 F.3d 7 (2d Cir. 1995) (per curiam). The Seventh Circuit's rule is that district courts may consider changed circumstances *only* to the extent that they do not relate to an issue already decided by the court of appeals. See *infra* pp. 10-11. That holding implicates a three-way circuit conflict that merits this Court's review. A minority of circuits go even further than the Seventh Circuit, holding that resentencing is limited to the facts as they stood at the time of "the first [sentencing] hearing." Most circuits take the opposite approach: they permit or even require consideration of changed circumstances no matter what the issues resolved by prior appeal.

A. Three Circuits Require Courts To Ignore Intervening Circumstances When Resentencing A Defendant.

The Eighth Circuit in its often-cited *Cornelius* ruling expressly limits the resentencing calculus to the facts as they existed when the defendant was originally sentenced: "Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue *that it could have heard at the first [sentencing] hearing*." *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992) (emphasis added). Developments since the original sentencing are out of bounds. See *United States* v. *Sims*, 174 F.3d 911, 913 (8th Cir. 1999) (relying on *Cornelius* for rule that post-sentencing developments are irrelevant at resentencing).

The Fourth and Tenth Circuits have adopted the same rule. In *United States* v. *Bell*, 5 F.3d 64, 67 (4th Cir. 1993), the Fourth Circuit quoted *Cornelius* for the proposition that, so long as the court of appeals' mandate permits it, a district court on resentencing may "entertain[] 'any relevant evidence * * * that it could have heard at the first hearing.'" See also *United States* v. *Apple*, 962 F.2d 335, 336-337 (4th Cir. 1992) (district court properly concluded that circumscribed appellate mandate foreclosed consideration of changed circumstances at resentencing). Likewise, in *United States* v. *Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994), the Tenth Circuit held that even in a case of "fully de novo resentencing" a district court may only consider "'relevant evidence the court could have heard at the first sentencing hearing'" (citing *Bell* and *Cornelius*); see also *United States* v. *Warner*, 43 F.3d 1335, 1340 (10th Cir. 1994) (same). "[E]vents arising after that time are not within resentencing reach." *Warner*, 43 F.3d at 1340; see also *United States* v. *Moore*, 83 F.3d 1231, 1234 (10th Cir. 1996) (same); *United States* v. *Davis*, 182 F.3d 1201, 1202 (10th Cir. 1999) (same).[3/]

B. The Seventh Circuit Has Adopted A Hybrid Approach.

The Seventh Circuit has not adopted the categorical rule of the Fourth, Sixth, and Eighth Circuits. Unlike these courts, the Seventh Circuit to some extent permits district courts to consider "extraordinary unforeseen events occurring after the original sentencing." *United States* v. *Buckley*, 251 F.3d 668, 670 (7th Cir. 2001). But this rule is limited. District courts may not consider changed circumstances bearing on an issue that the court of appeals has already adjudicated. The Seventh Circuit thus reads *Cornelius* narrowly, emphasizing that its limitations apply only where the court of appeals has already

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[3/] Although the case did not involve any intervening circumstances, the Eleventh Circuit has quoted *Cornelius* with approval for its rule that, "'[o]nce a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing.'" *United States* v. *Jones*, 36 F.3d 1068, 1070 (1994).

addressed a ground for departure on which the defendant again relies at resentencing: "'[T]he district court can hear any relevant evidence on *that* issue [*i.e.*, the one already considered by the court of appeals] that it could have heard at the first hearing.'" *United States* v. *Polland*, 56 F.3d 776, 779 (7th Cir. 1995) (emphasis in original) (cited in *Buckley*, 251 F.3d at 669). Here, the Seventh Circuit found that it had previously rejected petitioner's poor health and advanced age as grounds for departure; the court's limited application of *Cornelius* meant the district court could not revisit these issues, notwithstanding the dramatic, intervening change in petitioner's condition. App., *infra*, 2a.

C. Other Circuits Recognize District Courts' Authority To Consider Changed Circumstances At Resentencing.

Several circuits reject the *Cornelius* rule outright and allow (if not require) district courts to consider any changed circumstances when resentencing a defendant. In *United States* v. *Core*, 125 F.3d 74, 76-79 (2d Cir. 1997), the Second Circuit held that district courts should consider rehabilitation that defendants achieved after their original sentencing.[4/] The court

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[4/] Like the Second Circuit's opinion in *Core*, some of the decisions discussed herein involved alleged post-conviction rehabilitation. The Sentencing Commission ultimately addressed this particular issue in a Policy Statement, effective November 1, 2000, prohibiting courts from departing on the basis of "[p]ost-sentencing rehabilitative efforts." U.S.S.G. § 5K2.19. This in no way affects the sweeping rules, discussed above, that circuits have established for dealing with post-sentencing developments generally. Indeed, *Core* itself makes plain that its rule is not limited to claims of post-sentencing rehabilitation. See 125 F.3d at 77 (reasoning that, had defendant "rendered assistance to the government by cooperating since his initial sentence, we see nothing in the statutes or the Guidelines that would have precluded the court from taking that conduct into account" at resentencing); see also *United States* v. *Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002) (discussing availability of departure for extraordinary family circumstances arising since original sentencing), cert. denied, 123 S. Ct. 2246 (2003); *United States* v. *Cox*, 2001 WL 920260, at *10 (E.D.N.Y. Aug. 3, 2001) (court is "permitted, if not obliged," to consider post-appeal conduct inconsistent with acceptance of responsibility claim), aff'd, 299 F.3d 143 (2d Cir. 2002).

stated broadly that, "[w]hen the trial court undertook to resentence [the defendant] * * * it was *required* to consider him as he stood before the court at that time." *Id.* at 77 (emphasis added); see also *Werber* v. *United States*, 149 F.3d 172, 178 (2d Cir. 1998) ("the district court was required to resentence [the defendant] in light of the circumstances as they stood at the time of his resentencing").

The Second Circuit recognizes district courts' power to consider changed circumstances even where (as was arguably true in petitioner's case) the mandate on remand is otherwise narrowly circumscribed. See *United States* v. *Bryce*, 287 F.3d 249, 253 (2d Cir.) ("'even where the appellate court remands a case with specific limiting instructions, such a mandate does not "preclude" a departure based on intervening circumstances'"), cert. denied, 123 S. Ct. 117 (2002); *United States* v. *Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (per curiam) ("This Court has consistently held that a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing," even where the court of appeals remanded for the limited purpose of "'resentenc[ing] [defendant] according to his original offense level'"). In short, "even when a remand is limited, an issue may be raised if it arises as a result of events that occur after the original sentence." *United States* v. *Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002), cert. denied, 123 S. Ct. 2246 (2003). The *Quintieri* court elaborated:

> If, for example, a woman whose spouse cared for their young children is convicted of a crime, she might see little point in seeking a downward departure pursuant to § 5K2.0 of the Guidelines on the basis of extraordinary family circumstances. If, between her first and second sentencing, her spouse were to die unexpectedly, however, we do not doubt that she could raise the issue of extraordinary family circumstances in a second sentencing following remand even though the remand was "limited" to a different issue.

Id. at 1230; see also *United States* v. *Carpenter*, 320 F.3d 334, 341 n.7 (2d Cir. 2003) ("a downward departure for the detrimental effect of incarceration on others could be based on

events occurring after [the defendant] was first sentenced"). The district court in *United States* v. *Tichio*, 1999 WL 47325, at *4 & n.1 (S.D.N.Y. Feb. 1, 1999), thus considered "post-conviction rehabilitation and/or other extraordinary circumstances which allegedly have occurred subsequent to [defendant's] conviction and sentence," including "*medical grounds*" (emphasis added).

In stark contrast to the Seventh Circuit rule, moreover, the Second Circuit requires district courts to consider changed circumstances even when they bear directly on a legal issue already addressed by the court of appeals. In *Bryson*, the Second Circuit vacated a departure for extraordinary rehabilitation and remanded for the limited purpose of resentencing the defendant without the benefit of that departure. 229 F.3d at 425-426. On a subsequent appeal, the court held that, despite its prior determination that the defendant had not shown sufficient rehabilitation, the district court was free to depart on that basis again on remand if intervening circumstances warranted. *Id.* at 426 (limited remand "did not foreclose the possibility * * * of a rehabilitation that might occur between our decision and the resentencing. This Court has consistently held that a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing").

In addition to the Second Circuit, five other courts of appeals likewise recognize district courts' authority to consider changed circumstances at resentencing.[5] See *United States* v. *Bradstreet*, 207 F.3d 76, 82 & n.6 (1st Cir. 2000) (expressly rejecting *Cornelius* rule and permitting district courts to

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[5] Ninth Circuit case law is internally inconsistent. Compare *United States* v. *Green*, 152 F.3d 1202, 1206-1208 (9th Cir. 1998) (district court may consider intervening circumstances in resentencing defendant); and *Rewak* v. *United States*, 512 F.2d 1184, 1186 (9th Cir. 1975) ("It is a common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence"), with *United States* v. *Matthews*, 278 F.3d 880, 889 (9th Cir.) (en banc) ("we have created exceptions to our general rule that the district court resentence de novo to 'preclude consideration of post-sentencing conduct'"), cert. denied, 535 U.S. 1120 (2002).

resentence based on developments since original sentencing); *United States* v. *Sally*, 116 F.3d 76, 79-81 (3d Cir. 1997) (allowing consideration of intervening changes); *Puente* v. *United States*, 676 F.2d 141, 145 (5th Cir. 1982) ("'it is a common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence'"); *United States* v. *Rudolph*, 190 F.3d 720, 724 (6th Cir. 1999) ("'It makes no sense to preclude a sentencing judge from considering facts pertinent to resentencing that had not yet arisen at the time of the original sentence'"); *United States* v. *Akrawi*, 982 F.2d 970, 973 (6th Cir. 1993) (noting that district court considered "several facts which had changed since the first sentencing" when resentencing the defendant)[6]; *United States* v. *Rhodes*, 145 F.3d 1375, 1378-1382 (D.C. Cir. 1998) (district court can consider new developments); *United States* v. *Dyce*, 975 F. Supp. 17, 20-22 (D.D.C. 1997) (departing downward based on circumstances arising since defendant's original sentencing, *including substantial decline in health*).[7]

As these courts recognize, allowing district courts to

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[6] Unlike the Second Circuit, however, the Sixth Circuit holds that a narrow mandate on remand can preclude any such consideration. See *Rudolph*, 190 F.3d at 726, 728.

[7] An April 2003 amendment to 18 U.S.C. § 3742 does not resolve the circuit split. New language provides that, on remand for resentencing, a district court "shall not impose a sentence outside the applicable guidelines range except upon a ground that—(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure." 18 U.S.C. § 3742(g). The amendment does not address changed circumstances, as it easily could have, and there is no reason to think that Congress considered and resolved an issue so contentious among the courts of appeals and overturned settled Supreme Court jurisprudence *sub silentio*. The amendment is meant merely to prevent district courts on remand from using new sentencing theories as pretexts for reimposing departures overturned on appeal. See, *e.g.*, H.R. Conf. Rep. No. 108-66, at 59 (Apr. 9, 2003) (new section is intended to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory"). There is nothing pretextual about a court's reliance on actual, changed circumstances in resentencing a defendant.

consider changed circumstances at resentencing is true to the Guidelines and governing statutes: "The principle that a defendant is sentenced as he stands before the court derives partly from the Guidelines requirement that relevant conduct must be taken into account in setting a defendant's Guidelines range." *Bryce*, 287 F.3d at 253 (citing U.S.S.G. § 1B1.3(a)); see also *Rhodes*, 145 F.3d at 1381 (reasoning that rule is consistent with federal statutory scheme). It is also absolutely essential if sentencing is to account rationally for the defendant's circumstances, particularly given that the condition of aged and infirm defendants can deteriorate quickly, as in this case.

This rule also follows from the Court's decision in *Koon* v. *United States*, 518 U.S. 81 (1996), which allows sentencing courts to consider any factor not expressly prohibited by the Guidelines. *Id.* at 109 ("a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor"); see *Bradstreet*, 207 F.3d at 81-82; *Rudolph*, 190 F.3d at 722-723; *Green*, 152 F.3d at 1207-1208; *Rhodes*, 145 F.3d at 1378-1379; see also *North Carolina* v. *Pearce*, 395 U.S. 711, 723 (1969) (recognizing "[t]he freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence"), overruled in part on other grounds, *Alabama* v. *Smith*, 490 U.S. 794 (1989); cf. *Sell* v. *United States*, No. 02-5664, slip op. 18-19 (June 16, 2003) ("the Government should [evaluate petitioner for possible forced medication on remand] on the basis of current circumstances," because petitioner's "medical condition may have changed over time").

There are also powerful policy reasons to consider a defendant's changed circumstances at resentencing, particularly where the defendant is elderly and increasingly infirm. Imprisonment is a uniquely harsh experience for such inmates, a fact that effectively increases their punishment. At the same time, the rapidly growing number of aged and infirm inmates in the federal system poses mounting fiscal and logistical burdens. See, *e.g.*, *United States* v. *Baron*, 914 F. Supp. 660, 664 (D.

Mass. 1995) ("Keeping infirm elderly people behind bars can cost up to three times more than imprisoning younger offenders"); Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 J. Contemp. Health L. & Pol'y 687, 687 (2001) (Federal Bureau of Prisons predicts 16% increase in population of inmates over 50 between 1998 and 2005). These costs seem especially burdensome in light of the low likelihood of recidivism. Molly F. James, Note, *The Sentencing of Elderly Criminals*, 29 Am. Crim. L. Rev. 1025, 1027 (1992) ("the infirm elderly person is least likely to commit crimes in the future").

Working under the proper rule, the Seventh Circuit would have had to address the fact that the district court made obvious errors at petitioner's resentencing. In the end, the fact that petitioner was sentenced in the Seventh Circuit (rather than one of the six circuits adhering to the majority rule) meant that he was denied the opportunity to receive a downward sentencing departure based on the precipitous change in his condition.

II. Certiorari Should Be Granted To Resolve The Entrenched Circuit Conflict Over Whether 18 U.S.C. § 1014 Criminalizes Misstatements Unrelated to Lending Transactions.

Certiorari is also warranted because this case presents a square conflict over the proper construction of 18 U.S.C. § 1014, which governs "loan and credit applications" (title). Section 1014 makes it a crime to "knowingly make[] any false statement * * * for the purpose of influencing in any way * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation." The Seventh Circuit majority's holding that Section 1014 applies to "transactions other than loans" or other extensions of credit intrudes markedly into the traditional domain of state criminal law, for it extends the statute to encompass essentially any false statement, whatever the context, to a banking institution. The decision below also openly conflicts with the Fifth Circuit's holding in *United States* v. *Devoll,* 39 F.3d at 580, that "section 1014 applies only to actions involving lending transactions."

In *Devoll*, the court of appeals explicitly rejected as inconsistent with Section 1014 the district court's jury instruction under which the defendant was convicted because he made a false statement merely "for the purpose of influencing some action to be taken by" a federally insured bank. The Fifth Circuit canvassed the "statutory language" and "legislative history" of Section 1014, concluding that the statute applies only to "false representations * * * made to influence" the bank's "lending activities." 39 F.3d at 579.[8/] Confronted with precisely the same issue in this case, the Seventh Circuit took the opposite view. The panel majority rejected petitioner's argument that he did not violate Section 1014 because "the withdrawals of the trust funds were not lending transactions," declining "to follow *Devoll*." App., *infra*, 19a.

The circuit conflict over the proper construction of Section 1014 is outcome determinative of many criminal prosecutions, including this one. Petitioner's conviction was based not on a loan from funds owned by a bank but on the withdrawal of funds that he had raised from the sale of Industrial Revenue Bonds to third parties, withdrawals that cannot on any view be characterized as loans or the extension of credit. As the trial court found and as federal law requires (see 12 U.S.C. § 92a(c)), the banks' trust departments were entirely separate from the banks' lending activities. Therefore, if this case had arisen in the Fifth Circuit, petitioner's conviction would have been reversed under *Devoll* because it was based on actions entirely unrelated to lending transactions.

The conflict is also frequently recurring. The government brings numerous prosecutions under 18 U.S.C. § 1014, and therefore the courts of appeals are frequently called upon to decide the scope of the statute. See, *e.g.*, *United States* v. *Lane*, 323 F.3d 568 (7th Cir. 2003) (Section 1014 applies to failure to disclose information on loan refinancing application); *United States* v. *Tierney*, 266 F.3d 37 (1st Cir. 2001) (false personal

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[8/] Though the Fifth Circuit ultimately affirmed the defendant's conviction on the ground that the jury instruction in that case was not "plain error," *Devoll* stands for the proposition that Section 1014 "relates only to lending activities." *United States* v. *Boren*, 278 F.3d 911, 916 (9th Cir. 2002).

financial statement); *United States* v. *Hicks*, 217 F.3d 1038 (9th Cir. 2000) (filing false financial returns to obtain business loan); *United States* v. *Jenkins*, 210 F.3d 884 (8th Cir. 2000) (false credit card sales slips); *United States* v. *Koh*, 199 F.3d 632 (2d Cir. 1999) (false application for letter of credit). The broad interpretation given to Section 1014 by the Seventh Circuit in this case would extend the number of transactions covered by the statute even further. *E.g.*, *United States* v. *Boren*, 278 F.3d 911 (9th Cir. 2002) (stop payment request); *United States* v. *Wade*, 266 F.3d 574 (6th Cir. 2001) (checking account application).

The irreconcilable holdings of the Fifth and Seventh Circuits have created a conflict that requires this Court's intervention. A leading treatise notes "uncertainty as to the scope of section 1014," with the decision in this case calling into question the "traditional view" espoused in *Devoll* that "the statute only applies to statements made for the purpose of influencing the bank in its lending activities." Modern Federal Jury Instructions ¶ 37.03 (2002).

Petitioner presented the circuit conflict in his petition for certiorari from the Seventh Circuit's ruling in the initial appeal in this case. This Court denied certiorari (528 U.S. 810 (1999)), most likely because the conflict was not mature at that point. As Judge Ripple noted in dissent, at that time *Devoll* did not stand "in opposition to the positions of" circuits other than the Seventh, because other circuits interpreting Section 1014 had all applied the statute to "situation[s] involving the bank's function of extending credit." App., *infra*, 27a (Ripple, J., dissenting in part) (citing *United States* v. *Yoo*, 833 F.2d 488, 489 (3d Cir. 1987)); *United States* v. *Bonnette*, 781 F.2d 357, 359 (4th Cir. 1986)). Therefore, the positions of the other circuits were still "in harmony with the Supreme Court's explicit determination that the statute was designed to provide 'penalties for making false statements or reports in connection with loans or other similar transactions.'" *Id.* at 28a (quoting *Williams* v. *United States*, 458 U.S. at 289-290). It accordingly remained possible that the Seventh Circuit, which at that time stood alone in its rejection of the traditional view of Section 1014 adopted by the Fifth Circuit in *Devoll*, would later

revisit its position. But in the intervening four years, the conflict with the Fifth Circuit's position has only grown more substantial as other circuits have embraced the Seventh Circuit's reading of Section 1014. See *United States* v. *Boren*, 278 F.3d at 915-916 (citing *Krilich*); *United States* v. *Wade*, 266 F.3d 574, 580 (6th Cir. 2001) (same).[9/]

The conflict is thus intractable. In ordinary civil litigation, or even with respect to certain questions of criminal law, it arguably would be reasonable to await a later case in the Fifth Circuit to determine whether that court would adhere to its position. That option is critically unavailable in this context, however, for the *Devoll* ruling precludes the government from ever initiating a prosecution under Section 1014 in the Fifth Circuit with respect to activities not related to lending transactions. It is therefore all but impossible for a case to present the Fifth Circuit with an opportunity to reaffirm or reconsider its position. This dispute over the proper interpretation of Section 1014 means that criminal defendants in different parts of the country will *indefinitely* receive inconsistent treatment under the statute depending on the geographic location of the activities with which they are charged. That result is untenable.[10/]

Certiorari is furthermore warranted because the Seventh Circuit's ruling is inconsistent with this Court's decision in *Williams* v. *United States*, 458 U.S. 279 (1982). In *Williams*,

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[9/] Even on the Sixth and Ninth Circuits' broader reading of Section 1014, petitioner would have been acquitted, because in *Boren* and *Wade* the banks at least faced the possibility of suffering financial losses.

[10/] The Government's contention that Section 1014 encompasses all false statements to federally insured banking institutes parallels its contention in other cases that the federal bribery statute, 18 U.S.C. § 666, applies to all bribery of employees of state and local governments that receive federal funding. In both instances, the federal government's construction causes federal criminal statutes to intrude considerably upon the territory of traditional state criminal law without any explicit Congressional mandate. A circuit conflict has arisen with respect to Section 666 that parallels the conflict over the proper interpretation of Section 1014. See, *e.g.*, *United States* v. *Sabri*, 326 F.3d 937 (8th Cir. 2003) (citing cases).

this Court held that check kiting is not proscribed by Section 1014, reasoning that the text and legislative history precluded reading the statute as extending the federal criminal law to "a wide range of conduct" that "traditionally has been regulated by state law." *Id.* at 290.

The *Williams* Court emphasized that nothing in the legislative history suggested that the statute "should be applicable to anything other than representations made in connection with conventional loan or related transactions." *Id.* at 288-289. The legislative history of Section 1014 and of subsequent amendments have characterized the statute "simply as 'relating to false statements *in loan and credit applications*.'" *Id.* at 289 (quoting H.R. Rep. No. 1457, 91st Cong., 2d Sess. 21 (1970)) (emphasis added); see also *id.* (Section 1014 was "designed primarily to apply to borrowers from Federal agencies or federally chartered organizations" (quoting S. Rep. No. 1078, 88th Cong., 2d Sess. 4 (1964)); *id.* at 290 (statute "provides penalties for making false statements or reports in connection with loans or other similar transactions" (quoting H.R. Rep. No. 1556, 91st Cong., 2d Sess. 35 (1970)). Given this silence in the legislative history regarding non-loan transactions, the Court concluded that the rule of lenity does not permit "a broad[] reading of the statute."

The reasoning of the *Williams* Court, largely ignored by the court of appeals in this case, strongly suggests that the Fifth Circuit's reading of Section 1014 is the correct one. Like *Williams*, *Devoll* refused to read Section 1014 more broadly than the text requires, and thus to intrude upon the traditional domain of state criminal prosecutions, without stronger support in the legislative history. See *Devoll*, 39 F.3d at 580 ("With this [legislative history] we are not persuaded that the statute imposes liability whenever a defendant's false statement was intended to interfere with any activity of a financial institution"). Indeed, the *Devoll* court noted that, under the construction subsequently adopted by the Seventh Circuit in this case, Section 1014 "presumably would encompass fraud or false representations having nothing to do with financial transactions," such as a fraudulent *employment application*. 39 F.3d at 580. That was precisely the sort of broad reading that

the *Williams* Court cautioned against in light of the parsimonious legislative history.

Compounding its error, the Seventh Circuit relied on an inference from the structure of the statute that this Court disclaimed in *Williams*. The Seventh Circuit reasoned that Section 1014 must apply to transactions other than loans because the statute "deals with misstatements to" institutions that do not make loans. Because "the Office of Thrift Supervision and other listed bodies are just regulators," the court reasoned that if "their inclusion in the statute is to have meaning," Section 1014 must apply to "statements that are not designed to influence an extension of credit," indeed, to statements "that have nothing to do with the payment of money." App., *infra*, 20a-21a. In *Williams*, however, this Court recognized that the institutions cited by the Seventh Circuit were added by amendments that "attracted little attention in Congress and were dealt with summarily." 458 U.S. at 288. Therefore, according to the *Williams* Court, "[w]hile Congress has added and subtracted certain institutions to and from the list covered by Section 1014 over the intervening years, no changes have been made in the type of transactions proscribed by the provision." *Ibid.* To assume, as the court of appeals in this case did, that the addition of institutions such as the Office of Thrift Supervision to Section 1014 in 1990 broadened the scope of transactions covered by the statute flies in the face of this Court's reading of the relevant legislative history.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2003

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 02-1445

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT R. KRILICH, SR.,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 94 CR 419 David H. Coar, *Judge*

Submitted September 11, 2002*
Decided December 31, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

* This appeal has been submitted under Operating Procedure 6(b) to the panel that decided prior appeals in the case. The panel has concluded that additional oral argument is unnecessary.

ORDER

This is the fourth appeal we have considered in a criminal prosecution commenced eight years ago. The last time the case was here, we concluded that the evidence did not warrant any reduction in sentence under U.S.S.G. § 5H1.1 or § 5H1.4. After resolving other contentions, we remanded the case to the district court "with instructions to impose a sentence in the range of 135 to 168 months. *United States* v. *Krilich*, 257 F.3d 689, 694 (7th Cir. 2001). The district court held a hearing to select an appropriate sentence from this range. The final sentence, at 135 months, is the most favorable outcome that our mandate permits. Yet Krilich has appealed again, arguing that his sentence should have been lower.

Our remand did not permit the presentation of evidence or legal theories supporting a different range. The lawful range had been established on the basis of evidence and arguments presented during multiple evidentiary hearings and appeals. We held that a sentence *must* be imposed from the range 135-168 months. That decision became final when the Supreme Court denied Krilich's petition for certiorari. 122 S. Ct. 1175 (2002). New arguments presented after a decision of the kind we rendered do not justify departure from the mandate. See *Barrow* v. *Falck*, 11 F.3d 729 (7th Cir. 1993). A change of law after the rendition of an appellate opinion sometimes justifies revisiting decided issues, but Krilich does not point to any favorable change of law. Consequently the district judge had no authority to impose a sentence lower than the one Krilich received.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:94-cr-00419

Title: USA v. Krilich

Assigned Judge: Honorable David H. Coar

MINUTE ORDER of 2/15/02 by Hon. David H. Coar as to Robert Krilich: Defendant's motion for downward departure from guidelines based on defendant's changed medical condition is denied [443-1] for the reasons stated in the attached statement of reasons. (Enter statement of reasons) Mailed notice.

This docket entry was made by the Clerk on February 20, 2002.

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	No. 94 CR 419
v.	)	
	)	Honorable David H. Coar
ROBERT R. KRILICH, SR. Defendant.	)	

STATEMENT OF REASONS

This matter is before this Court for resentencing of the defendant Robert R. Krilich, Sr. ("Krilich) after remand from the Seventh Circuit of Appeals (*U.S.* v. *Krilich*, 257 F.3d 689). This is the second time that Krilich has been ordered resentenced. See *U.S.* v. *Krilich*, 159 F.3d 1020 (7th Cir. 1998). The mandate of the Court of Appeals was clear: "the case is remanded with instructions to impose a sentence in the range of 135 to 168 months. Nonetheless, Krilich filed a new motion for a downward departure "based on Defendants Changed Medical Condition. At the last resentencing hearing , this Court concluded that Krilich had four major physical infirmities: chronic cardiovascular disease; chronic peripheral vascular disease with hypertension; obstructive pulmonary disease: and lower back pain of lumbar and lumbosacral origin.

Defendant's "changed medical condition relates to the following series of events. Beginning on August 10, 2001, Krilich complained to Bureau of Prison ("BOP) staff about abdominal pain, nausea, vomiting, and inability to hold down liquids and medication. On August 14, 2001, he was taken by

ambulance to Samaritan Hospital of the Federal Medical Center of Lexington, Kentucky. On August 15, 2001, Krilich developed atrial fibrillation. There is some dispute as to whether his heart resumed normal sinus rhythm spontaneously or as a result of treatment; it is clear that a normal rhythm was achieved. Later that day, the cause of the nausea and vomiting was determined to be a bowel obstruction, which was removed by suction. Dr. Joseph Messer, a cardiologist, submitted an affidavit in support of the motion for downward departure, and he opined that, as a result of the atrial fibrillation event on August 15, 2001, (which Messer diagnosed as acute from reviewing the medical records), Krilich has developed "underlying electrical instability of his heart and he is at greater risk of recurring atrial fibrillation and other cardio arrhythmias.

In its most recent remand, the Seventh Circuit expressed surprise that this Court based its finding as to Krilich's heart ailments on the testimony of a psychiatrist. Perhaps to mute that concern, Krilich submitted the affidavits of two cardiologists, Drs. Messer and Fintel. Dr. Fintel testified at the sentencing hearing that he believes that Krilich suffers from coronary artery disease based on his risk factors and the symptoms reported in the medical records. One of the difficulties in getting an accurate and complete diagnosis is that early in his confinement the BOP was slow to recognize that Krilich had a possible coronary problem requiring diagnostic procedures. After they moved to administer the necessary tests, Krilich balked at having invasive testing done. Thus, in an affidavit, Dr. Tran, a staff physician at the BOP, reported that while Krilich was at the federal medical facility in Rochester, Minnesota, he was evaluated by a cardiologist from the Mayo Clinic who recommended that Krilich lose weight, work on controlling his hyperlipidemia and hypertension with dietary and lifestyle

changes and continue with a cardiac assessment including a coronary angiogram. Krilich refused to continue the assessment.

Dr. Rubin, the psychiatrist who testified at the previous sentencing hearing, also testified at this hearing. He views Krilich's refusal to cooperate with his diagnostic and treatment regimes as symptoms of major depressive disorder. His psychological condition complicates Krilich's physical problems in two ways. First, the depression inhibits his compliance with treatment regimes for both the depressive and coronary conditions. Rubin interprets frequent references in the medical notes to Krilich's irritability and obstinacy as symptoms of his depression. More significantly, Rubin cites to several studies identifying a significant increase in risk of mortality and coronary disease in patients who suffer from major depression.

Rubin observed that although Krilich's depression predates his incarceration, the stress of being in prison has exacerbated the problem, and the depression inhibits his ability to comply with the prescribed treatment programs. The result is that Krilich's depressive condition is not improving and when combined with his coronary problems, he faces at an increased risk of a coronary incident and of death. Rubin was also critical of the medication prescribed by the BOP. When asked whether or how Krilich's condition would be different outside prison, Rubin opined that Krilich would suffer less prison-induced stress on the outside and that he would have the support and encouragement of his family so that he would be likely to increase his compliance with the treatment regimen.

All three of Krilich's experts took issue with the BOP's medical response to Krilich's August 10, 2001 bout of intestinal blockage. Messer and Fintel felt that because of his prior history of angina and coronary problems, Krilich should have been

taken to a hospital right away and his heart should have been monitored throughout the incident. Rubin took issue with the fact that between August 10 and August 15 or 16 when Krilich was dehydrated and vomiting frequently, his medication for depression was administered orally. According to Rubin, the inability to digest this medication properly exacerbated his depression and his risk of a coronary event. Rubin's concerns about the link between major depression and risk of coronary disease were echoed by Fintel. Several published studies were offered documenting the statistical significance of this combination.

In its July 16, 2001 decision, the Seventh Circuit discussed the interplay between U.S.S.G. § 5H1.1 and § 5H1.4 and the showing that must be made to warrant a departure under these provisions. As articulated by the Court of Appeals, to receive a departure under § 5H1.4, a defendant must demonstrate an "extraordinary physical impairment. Paraphrasing the requirements, this showing can be made in one of four ways. The defendant must prove by a preponderance of the evidence that:

1) his bedridden condition is such that the physical condition effectively does the imprisoning; or

2) through competent medical testimony, the defendant needs constant care (which presumptively is not available in a prison context); or

3) the care that the defendant needs will not be available to him should he be incarcerated; or

4) the ailment is substantially more dangerous for prisoners than nonprisoners such that "imprisonment would shorten the defendant's life span, making a given term a more harsh punishment than the same term for a healthy person.

Krilich clearly did not meet the requirements of (1) and (2) above. He is not bedridden. In fact, Dr. Fintel testified that Krilich has no limitations on everyday life activities such as walking, eating, brushing his teeth. He has temporary restrictions from doing prison work, but he is hardly bedridden. Outside of prison, his condition would not be characterized as effectively imprisoning him. Nor does he need constant care. The best that can be said from Krilich's evidence in this regard is that he requires frequent medical followup.

The thrust of Krilich's evidence in support of his motion is addressed to items (3) and (4). Krilich's theory is that as a result of the convergence of his major depression, his coronary condition, and other risk factors, he faces a greater risk of future coronary incidents (and death) than persons without this combination. If this was all that he offered, he would lose, because these conditions would exist whether he was in prison or out. For example, Dr. Rubin testified that the depression predated his incarceration. Rubin attempts to provide the necessary link by saying that the stress of prison both exacerbates the depression and makes it difficult to treat because the depression causes Krilich to not follow the treatment regime prescribed to control and improve the depression. Outside of prison, Rubin posits, Krilich could be monitored more closely and the support of his family would make him more inclined to take his medications. Thus, Rubin concludes that unless the depression improves, the studies show that Krilich is more at risk of death because of the combination of major depression and coronary issues, and his life expectancy will be less than someone without major depression and coronary problems. Because as he sees it, the depression has not and will not improve in prison and will improve if he is released, he meets requirement (4). The problem with this approach is that Rubin's assumption that the depression will

improve outside of prison either because of the removal of prison related stress and/or a more diligent adherence to treatment regimens is untested. Moreover, outside of prison Krilich would be able to indulge his taste for alcohol and cigars, which are also risk factors. Rubin did not explain the effect of this trade-off in his overall risk profile of Krilich.

It is far from clear that Krilich will be more compliant with his treaters outside of prison. For example, there is no evidence that he was compliant before he went to prison (when he was presumably less depressed) than he was after he was incarcerated. If he was released and remained noncompliant, Rubin conceded that the option to force him to take medication is limited. This Court cannot conclude that Krilich meets requirement (4).

As to requirement (3), Dr. Fintel testified that the August 2001 incident involving a bowel obstruction that led to atrial fibrillation demonstrates that the level of monitoring, coordination, and response necessary to provide care to someone with Krilich's condition cannot be provided by the BOP. In order to make that argument, Krilich must extrapolate from the August 2001 incident, a conclusion that if faced with a future medical incident the BOP will react in a similar manner. Taken in a light most favorable to Krilich, the evidence indicates that the BOP botched Krilich's treatment on that occasion. The staff failed to diagnose the bowel obstruction quickly enough, in light of his complaints symptomatic of coronary problems, failed to monitor his heart quickly and closely. Does it follow that this negligent behavior is endemic? Krilich offers no credible evidence that the BOP's response was anything other than one act of negligence. Take away the assumption of error and what is left is a disagreement among medical providers about the proper course of treatment. Fintel did not testify that Krilich needed care of a type and degree that the BOP is incapable of providing. At best, he said that in this

August 2001 incident, the BOP should have done better. On the record, Krilich has not carried his burden as to requirement (3).

For these reasons, the motion for downward departure is denied.

Enter:

/s/

David H. Coar
United States District Judge
Dated: February 15, 2002

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant,

v.

ROBERT R. KRILICH, Defendant-Appellant, Cross-Appellee.

Nos. 97-2721, 97-2977.

Argued April 7, 1998.
Decided Oct. 27, 1998.
Rehearing and Suggestion for Rehearing En Banc Denied Jan. 26, 1999.*

Before EASTERBROOK, RIPPLE, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

A golfer's dream came true for Andy Sarallo. On June 19, 1985, Andy lined up at the ninth tee at Country Lakes Country Club and struck the ball; an observer on the ninth green pulled Andy's ball out of the hole. Andy's foursome jumped up and down and shouted for joy. Because the ninth hole at Country Lakes was the subject of a hole-in-one contest that day, Andy had just won his choice of a 1931 Cadillac or a check for $40,000!

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* Judge Flaum did not participate in the consideration of the suggestion for rehearing en banc. Judge Ripple and Judge Rovner voted to grant rehearing en banc. Judge Ripple voted to grant rehearing.

A hole-in-one is quite a thrill because it happens so infrequently pe rhaps one chance in 40,000, rarer than a 300 game in bowling. But Andy's chances were close to 100%, because his father was mayor of Oakbrook Terrace, Illinois, and the mayor's support was needed for a bond offering to finance an apartment complex to be built by Robert Krilich who sponsored the contest, pulled the ball out of the hole, and became the defendant in this criminal case. Krilich and Mayor Sarallo agreed to use the golf tournament as the vehicle for a payoff. Krilich palmed one of Andy's golf balls, put his hand into the cup, and displayed the ball. Delivering the bribe in this way enabled Krilich to shift the cost to the National Hole-In-One Association, which provided insurance. Thus fraud and bribery were coupled. Krilich admitted this scheme in a proffer to the United States Attorney, and he also conceded bribing the mayor to alter the zoning of some land and orchestrating the extraction of funds from municipal bond offerings. The bonds Industrial Revenue B onds, interest on which is not taxable to the investors were sold to finance Krilich's developments. Because the bonds were limited to specific projects (tax exemption depended on that link), the funds were placed in trust, and the trustee banks were to release the money only to reimburse expenses associated with the projects. Preferring to use the money elsewhere, such as for payments on his yacht, Krilich instructed vendors to falsify their invoices and had those bogus invoices sent to the banks for payment out of the trust accounts.

Krilich was convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1962(d) (RICO), and a fraud statute, 18 U.S.C. § 1014. Krilich maintains on appeal that the district court erred by permitting the prosecutor to use some of the proffer's contents at his trial, that 18 U.S.C. § 1014 does not apply to his conduct,

that the instructions improperly removed some issues from the jury's consideration, and that he is not criminally liable for other reasons.

The United States argues in a cross-appeal that Krilich's 64-month prison sentence is too low.

I

Statements made during plea negotiations are inadmissible, Fed.R.Evid. 410; Fed.R.Crim.P. 11(e)(6), but a defendant may waive the right to prevent their use. *United States* v. *Mezzanatto*, 513 U.S. 196 (1995). The agreement Krilich signed contains a conditional waiver:

> [S]hould [Krilich] subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer, nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury.

By authorizing the prosecutor to use his statements if he should contradict himself, Krilich made his representations more credible and thus strengthened his hand in negotiations. See *Mezzanatto*, 513 U.S. at 207; Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541 (1998). A prosecutor may be reluctant to negotiate; what has the defendant to offer? A statement that shows how the defendant's aid could assist the prosecutor in other cases (or lead to the appropriate sentence in this one) may get negotiations under way and set the stage for a favorable bargain. But a prosecutor needs assurance that the defendant is being candid. A conditional waiver of the kind Krilich signed tends to keep the defendant honest, which makes the proffer device

more useful to the both sides. For this strategy to work the conditional waiver must be enforceable; its effect depends on making deceit costly. We therefore reject the argument that waivers should be construed against prosecutors; that might help Krilich today but would hinder bargaining for other defendants tomorrow. We give this waiver neither a stingy reading nor a generous one, but a natural reading, which leaves the parties in control through their choice of language.

This agreement allowed the prosecutor to use the proffer as evidence if Krilich were to "testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer. Introduction of the statements thus was proper if either his testimony, see *United States* v. *Goodapple*, 958 F.2d 1402, 1409 (7th Cir.1992), or evidence that he presented through the testimony of others, see *United States* v. *Richardson*, 130 F.3d 765, 778 (7th Cir.1997); *United States* v. *Dortch*, 5 F.3d 1056, 1068 (7th Cir.1993), contradicted the proffer. Because Krilich did not testify, only the second clause is at issue. Krilich wants us to limit this clause to evidence presented through his own witnesses; evidence obtained by cross-examination of the prosecution's witnesses does not count, he insists. But that would be an unnatural reading of the language. Evidence is evidence, whether it comes out on direct or cross-examination. One can "otherwise present a position through arguments of counsel alone, so it is easy to see how a position can be "presented by evidence developed on cross-examination and elaborated by counsel. When the prosecution's witnesses are inclined to accommodate the defense, as many were in this case, developing one's position through cross-examination is especially attractive.

The prosecutor's position about the effect of the language is as unrealistic as Krilich's. According to the prosecutor, putting on any defense permits the United States to introduce

the statements. A plea of not guilty followed by passivity at trial is about all the defense can do, the prosecutor contends though, when pressed at oral argument, the prosecutor allowed that Krilich could have avoided introduction of the statements if he had limited his cross-examination to "the credibility, weight and sufficiency of the government's evidence in ways that were extrinsic to the facts of the case. On this understanding, asking a witness on cross-examination whether he had been convicted of perjury would be "extrinsic to the facts of the case, but asking the witness whether he had been in a position to see what happened at the ninth green on June 19 would open the door to the use of the proffer. Such a distinction makes sense of neither the language in the contract nor the reason why the waiver was conditional. The prosecutor wanted to give Krilich an incentive to tell the truth; Krilich wanted assurance that he could defend himself at trial if bargaining collapsed (for otherwise he was delivering himself into the prosecutor's hands); conditioning the use of the proffer statements on the presentation of a position "inconsistent with the proffer does both of those things only if the judge must find genuine inconsistency before allowing use of the statements.

Impeachment of a witness need not be "contrary to or "inconsistent with a defendant's admission of guilt in a bargaining proffer. To take a simple example, the statements "I faked the hole-in-one on the ninth hole (Krilich, in the proffer) and "I did not see Krilich palm a golf ball at the ninth hole on June 19 (a witness, on cross-examination) are not inconsistent. Investigation via cross-examination of witnesses' ability (or willingness) to observe and recount the facts they claim to have observed therefore could not have justified introduction of the proffer statements. Millions of people who live in Illinois did not see what happened at the ninth green on June 19; others

who did see what happened may have had reasons to misrepresent what they saw; proof that a given person who took the stand at trial was in the set of non-observers (or liars) is not "inconsistent with the proffer. Statements are inconsistent only if the truth of one implies the falsity of the other. The statements "Krilich pulled a palmed ball from the cup at the ninth hole and " Krilich wasn't at the ninth hole when Andy hit his shot are inconsistent because the former statement cannot be true if the latter is. This appeal turns on whether Krilich elicited such inconsistent testimony. The district judge concluded that he had, and that assessment is not clearly erroneous.

Several witnesses testified, in response to questions from Krilich's attorney, that the ninth hole at Country Lakes Country Club is close to the clubhouse and easily observed. Krilich wanted the jury to infer that no one would attempt to fake a hole-in-one there; that implication is inconsistent with the proffer. Defense counsel got two witnesses to say that they were at the ninth hole when Andy hit the shot but didn't think that Krilich was at the ninth hole then. This line of cross-examination was not designed to cast doubt on the witnesses' ability to see clearly or suggest that they are not trustworthy. Their testimony implied that Krilich did not fake the hole-in-one, contrary to what he admitted in his proffer. Similarly, in response to evidence that Krilich paid a bribe to obtain favorable zoning, his lawyer elicited testimony on cross-examination that no bribe was required because the city attorney thought the new zoning to be correct. Counsel likewise led witnesses to testify that the procedures followed for altering the zoning were not exceptional. Krilich's attorney also had the vice president of his company testify that he was not aware of any bribes paid to any public official in connection with any project. The implication was that if someone so close to Krilich

(and the projects) was unaware of bribes, there must not have been any. These statements go well beyond casting doubt on the prosecutor's evidence; they advance a position inconsistent with the proffer or so the trial judge sensibly could conclude.

Krilich insists that if the conditional waiver means what we think it means, then it is unenforceable because involuntary. *Mezzanatto* says that waivers of the plea-statement rules are unenforceable if given "unknowingly or involuntarily (513 U.S. at 210), but this is a far cry from saying that waivers mean whatever the defendants say they understood them to mean; no party to a contract has Humpty Dumpty's power over language either directly or through the gambit that unanticipated consequences render the agreement "involuntary. A waiver is voluntary in the absence of coercion, *Colorado* v. *Connelly*, 479 U.S. 157 (1986); *United States* v. *Brooks*, 125 F.3d 484, 492 (7th Cir.1997), and is knowing if made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986). Krilich does not contend that his assent was coerced and offers no support for a conclusion that he didn't understand the rights that Rules 410 and 11(e)(6) confer. A defendant's understanding of the consequences of his waiver need not be perfect; it was Krilich's understanding of the rights being relinquished, not of all possible repercussions of relinquishing them, that made his waiver knowing. See *Colorado* v. *Spring*, 479 U.S. 564 (1987).

II

One of the racketeering acts supporting Krilich's RICO conviction is a bribe of Nicholae Ionescu, Zoning Administrator and City Engineer of Oakbrook Terrace. Facing troubles with federal environmental authorities, Krilich asked Ionescu to supply an affidavit stating that development should be allowed

to continue. Ionescu signed the affidavit and that afternoon met with Krilich at a restaurant, where without saying a word Krilich passed Ionescu an envelope containing $300. Krilich contends that a "gratuitous after-the-fact payment is insufficient to prove bribery in Illinois, whose law controls on this question.

Illinois does not treat payment before-the-fact as an element of bribery. See, *e.g.*, *People* v. *Wright*, 105 Ill.App.3d 187, 434 N.E.2d 26 (2d Dist.1982). A corporation that pays employees at the end of the workweek instead of at the beginning does not give gifts every Friday. Thus Krilich must be arguing that, because the payment was gratuitous, it could not be a bribe. That's a tautology, but whether a payment was "gratuitous is a question of fact, rightly left to the jury. Krilich believes that the prosecutor adduced insufficient evidence of illicit intent behind the payment. But a reasonable jury could infer that this was a bribe indeed, that Ionescu was on Krilich's payroll, so often had he been bribed before. The lack of any comment during the payoff is strong evidence that this payment was expected (for Ionescu's part) and offered as compensation for the affidavit (for Krilich's).

III

The indictment charges that Sarallo solicited the hole-in-one bribe in April 1985. At trial, however, the prosecution elicited testimony from Terry Pearson, Krilich's bagman, that the bribe was solicited in the months preceding April 1984. Everyone agrees that the hole-in-one bribe was in exchange for Sarallo's support in an April 1984 vote regarding the Oakbrook Terrace bond issue, so the date in the indictment is a blunder. Citing *Stirone* v. *United States*, 361 U.S. 212 (1960), Krilich argues that the prosecutor, by arguing the new date at trial, constructively amended the indictment in violation of the grand

jury clause of the fifth amendment. But charging that an act occurred on one date and proving that it occurred at a different time is a classic variance, which does not change the nature of the crime alleged. *United States* v. *Nicosia*, 638 F.2d 970, 976 (7th Cir.1980). Compare *Stirone* with *United States* v. *Miller*, 471 U.S. 130 (1985). Cases such as *United States* v. *Willoughby*, 27 F.3d 263, 265-66 (7th Cir.1994), like Stirone itself, involved the substitution of one criminal offense for another; a change of dates does not (the date of a crime is not an element of the offense). Krilich has not argued that the difference between the allegations and the proof prejudiced his ability to defend himself; variance here was harmless. *United States* v. *Cina*, 699 F.2d 853, 858-59 (7th Cir.1983).

IV

Krilich was convicted of fourteen counts of violating 18 U.S.C. § 1014:

> Loan and credit applications generally; renewals and discounts; crop insurance.
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank

> association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 U.S.C. § 3101(1) and (3)]), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

Krilich's agents made the false statements so that he could tap bond proceeds held in trust by banks. He argues that this provision applies only to statements made to obtain loans or other extensions of credit; because the withdrawals of the trust funds were not lending transactions, the statute was not violated, he submits. *United States* v. *Devoll*, 39 F.3d 575, 579-80 (5th Cir.1994), supports this contention, but this court

and at least two more have applied § 1014 to transactions other than loans. *United States* v. *Tucker*, 773 F.2d 136, 139 (7th Cir.1985); *United States* v. *Yung Soo Yoo*, 833 F.2d 488 (3d Cir.1987); *United States* v. *Bonnette*, 781 F.2d 357, 366 (4th Cir.1986). Tucker affirmed a conviction of a con artist who forged shipping documents that led a bank to permit a draw against a letter of credit; so far as the opinion reveals, the letter of credit was fully funded and the only loser was the would-be purchaser. See also *United States* v. *Erskine*, 588 F.2d 721, 722 (9th Cir.1978) (Kennedy, J.) (§ 1014 applies to "a loan or one of the other transactions listed in the statute). Krilich ignores this adverse precedent but apparently wants us to overrule Tucker in order to follow Devoll.

Krilich faces an uphill battle. The text of the statute is straightforward and broad: it applies to "any statement made for the purpose of influencing in "any way the action of "any of the covered institutions in "any application. Krilich caused vendors to make false statements in applications presented to federally insured banks. To overcome § 1014's breadth Krilich relies on the title of the section, specifically the phrase "[l]oan and credit applications generally. The title, according to Krilich, informs the reader that the statute applies only to applications for loans or credit, and not to applications for funds held in trust. Yet if the title limits the statute's breadth, then Krilich might as well argue that because his statements were not made in connection with "crop insurance the statute does not apply to them. Although a statute's title can inform the understanding of ambiguous text, it does not "limit the plain meaning of the text. *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998) (quoting from *Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528 (1947)). This text is not ambiguous, and only last year the Supreme Court reminded us not to add elements to § 1014. See *United States* v. *Wells*,

519 U.S. 482 (1997) (materiality is not mentioned in § 1014, a "natural reading of § 1014 would not make it an element, and therefore the prosecutor need not establish that the false statement is material to the financial institution's decision).

The drumbeat of "any in § 1014 is not the only reason to conclude that it applies to transactions other than loans (and crop insurance). It deals with misstatements to "a Federal Reserve bank, . . . the Office of Thrift Supervision, . . . the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, [and] the National Credit Union Administration Board, among others. None of these institutions makes loans (or underwrites crop insurance); and although one could quibble with this assessment by saying that the discount activities of the Federal Reserve and some of the operations of the FDIC (or RTC) as receiver of failed financial institutions involve loans, the Office of Thrift Supervision and other listed bodies are just regulators. If their inclusion in the statute is to have meaning, then § 1014 must cover statements that are not designed to influence an extension of credit indeed, must cover statements that have nothing to do with the payment of money. Krilich's statements, like those in Tucker, were designed to induce a financial institution to disburse money, so they are within the reach of § 1014. Tiebreakers and doubt resolvers such as the Rule of Lenity therefore do not help Krilich; his problem is not that the statute is ambiguous, but that it is comprehensive. Legislative history likewise is of no assistance, given the Supreme Court's view that legislative history may not be employed to limit the effect of a broadly worded statute. *Brogan* v. *United States*, 522 U.S. 398 (1998).

Williams v. *United States*, 458 U.S. 279 (1982), on which Krilich relies so heavily, does not support his thesis. Williams

posed the question whether a no-funds check is a "false statement for the purposes of § 1014; the Court concluded that the only "statement made by a check is an instruction to the drawee bank to pay, and that the implication that funds are available for that purpose is not covered by § 1014 because a misleading implication differs from a false statement.

Cf. Bronston v. *United States*, 409 U.S. 352 (1973). Krilich can find no comfort in this conclusion; he induced vendors to make literally false statements. Only by departing from the holding of Wells that courts must not restrict the scope of § 1014 could we accept Krilich's understanding of the statute.

This does not conclude the appeal on the § 1014 counts, because the district judge instructed the jury that the falsified invoices and requisitions "were 'applications' within the meaning of this statute and that the funds withdrawn from the trust accounts pursuant to authorizations by the banks were 'advances' within the meaning of the statute. Krilich argues that this instruction amounted to summary judgment on the "application or advance element of § 1014, violating the sixth amendment by depriving him of a jury trial on all elements of the offense. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993); *United States* v. *Ladish Malting Co.*, 135 F.3d 484, 490 (7th Cir.1998).

Krilich objected to this instruction but did not give a reason. Under Fed.R.Crim.P. 30 reasons are essential, so the prosecutor contends that our role is limited to a search for plain error. Fed.R.Crim.P. 52(b). Krilich responds that the reasons were "self-evident, making recitation otiose, and adds that the district judge must have been aware of *United States* v. *Gaudin*, 515 U.S. 506 (1995), which demonstrates that issues such as these are for juries to decide. Yet it is exactly to avoid speculation about what judges must or should have known that

Rule 30 calls for litigants to explain themselves. A citation to Gaudin could have led the district judge to withdraw the instruction and avoid this error. Rule 30 does not require elaborate or detailed argument, see *United States* v. *O'Neill*, 116 F.3d 245, 247 (7th Cir.1997), but counsel must say enough to inform the judge why the instruction is wrong, so that errors can be prevented. *United States* v. *Roth*, 860 F.2d 1382, 1390 (7th Cir.1988).

An instruction that removes from the jury's purview questions that under Gaudin the sixth amendment commits to its decision is plain error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461 (1997), quoting from *United States* v. *Olano*, 507 U.S. 725, 736 (1993). This showing Krilich does not even attempt to make. He does not say that he denied at trial that the requisitions were "applications, or the disbursements "advances ; the evidence that they were is overwhelming, and no jury could have found otherwise, so Rule 52(b) precludes reversal on account of this error.

V

The United States cross-appeals, contending that the district judge applied the Sentencing Guidelines improperly. Because the underlying conduct for the RICO conviction was bribery, the relevant guideline is § 2C1.1(b)(2)(A):

If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

After finding that Krilich's benefit was between $5 million and $10 million, the district court used the table at

§ 2F1.1(b)(1) to calculate an increase of 14 offense levels but immediately departed downward 7 levels.

Application Note 7(b) to § 2F1.1 provides: "Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted. The judge concluded that a mechanical application of the table significantly overstates the seriousness of Krilich's conduct. According to the United States, the Guidelines do not permit a departure for this reason. Although § 2C1.1 refers to the table in § 2F1.1, it does not adopt the application notes to that table, the prosecutor insists. Many guidelines incorporate the table in § 2F1.1, and this is not the first time we have had to decide whether judges may refer to the application notes that explain (or limit) the operation of that table. But the last time the subject came up, the parties' positions were reversed: the defendant argued that § 2F1.1's table should be applied without reference to its application notes, and the United States contended that reference to the notes was necessary, indeed obligatory. We held that the table is far from self- explanatory and that reference to its application notes is essential to its accurate application. *United States* v. *Kim Tae Sung*, 51 F.3d 92, 94-95 (7th Cir.1995). What's sauce for the goose is sauce for the gander. The district judge was entitled to accept the invitation extended by Application Note 7(b). See *Koon* v. *United States*, 518 U.S. 81, 94-96 (1996).

Any departure, even one based on factors identified by the Sentencing Commission as appropriate, must be carefully considered and explained. We have considerable doubt that the district court's departure satisfies this requirement. Application Note 7(b) authorizes a downward departure if the table overstates the seriousness of the defendant's conduct. But the district judge did not directly address this issue; instead the judge believed that the Sentencing Commission should have

made the sentence depend on the loss to third parties rather than the gain to the perpetrator, and it was the lack of a "loss table that led him to cut in half the number of levels produced by the "gain table. According to the judge, Krilich's scheme produced a profit for him without an offsetting loss to anyone else, which justified a reduced sentence. Add the gain to the loss and divide by two to get the right result, the judge reasoned.

There is much to be said, as a matter of first principles, for using loss rather than gain as the starting point in determining sanctions. See Richard A. Posner, ECONOMIC ANALYSIS OF LAW § 7.2 (5th ed.1998); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Sometimes the Guidelines follow this approach. The table in § 2F1.1 is a loss table, designed for fraud cases (so the touchstone is the victim's loss rather than the offender's gain). But other guidelines, of which § 2C1.1 is an example, use additional benchmarks; § 2C1.1 requires the judge to use the greatest of payment, loss, or benefit, according to the monetary categories in the § 2F1.1 table. Because departure is proper only when a case presents a circumstance "of a kind or to a degree not adequately considered by the Sentencing Commission, 18 U.S.C. § 3553(b), a district court's disagreement with the Commission's resolution of an issue it considered is never an appropriate ground for departure. *Koon*, 518 U.S. at 106.

The district judge's approach is questionable in implementation in addition to being incompatible with the Guidelines. Because the Commission's tables are log-linear (and thus diminish the effect of large numbers), the approach of adding gain to loss and dividing by two should have been applied to the dollar figures, not to the offense level. Suppose the gain was $9 million and the loss zero. The average would be $4.5 million, which under the table in § 2F1.1 would produce a 13-level increase (only one fewer than the 14-level increase

appropriate for the $5 million to $10 million range). Cutting the number of levels in half, to seven, gave Krilich the same sentence that would have been meted out to an offender whose gain (or loss caused) was between $120,000 and $200,000. The district judge never explained why Krilich is no more culpable than a person whose crime produces a gain or loss in that range.

What is more, we doubt the premise that Krilich committed a victimless crime. The district judge emphasized that Krilich did not obtain money from the municipalities but simply capitalized on their ability to facilitate investments whose return would not be taxed to the bondholders. That may be so, but the United States Treasury lost approximately a dollar in tax revenue for every dollar Krilich saved. The benefit to Krilich was a reduction in the rate of interest he had to pay to borrow the money for his projects. If interest on the bonds had been taxable, he would have had to pay more to make the investors indifferent between purchasing the taxable instruments and investing in tax-free instruments of equivalent risk, such as municipal bonds. The correspondence between Krilich's gain and loss to the public fisc is not exact, because some investors (pension trusts, for example) do not pay immediate taxes on any of their investments--though their beneficiaries will pay taxes when they receive their pensions. Calculating the actual loss in tax revenues from providing investors with a tax shield that the law does not allow is quite complex, and we do not suggest that a district court is required to undertake the calculation, but the existence of a substantial tax loss is undeniable. The difficulty of determining loss in bribery cases is one reason why the Commission could sensibly decide to focus on perpetrators' gains, which often can be ascertained more readily.

So although a departure might be justified under Application Note 7(b), the district court's reasoning is inadequate to support a seven-level departure. Before deciding

on remand whether the table in § 2F1.1 "significantly . . . overstates the seriousness of the defendant's conduct, the district court must recalculate Krilich's gain. Having decided to take a meat axe to the table in § 2F1.1 indeed, having announced even before hearing evidence about Krilich's gain that he would do this the judge saw little reason to decide whether the gain exceeded $10 million, as the prosecution contended. Such a finding would add one extra level, but the judge was determined to allow no more than seven from the table, and whether the calculation was 14 - 7 = 7 or 15 - 8 = 7 did not matter. Because the starting point does matter, it must be ascertained with more confidence than the judge expressed in his pronouncement that the $5 million to $10 million range was as good a starting point as any.

On remand the judge should give no weight to the second factor that influenced the departure: the disparity between Krilich's presumptive sentence under § 2F1.1 and Mayor Sarallo's actual sentence, and between Krilich's sentence and those sentences handed out in the Operation Greylord prosecutions of judicial corruption during the 1980s. Consideration of variance among the sentences of different offenders is permissible only when the disparity is "unjustified. *United States* v. *Meza*, 127 F.3d 545, 549- 50 (7th Cir.1997). Differences that occur as a result of a proper application of the Guidelines in light of the prosecutor's charging decisions are never "unjustified as Meza defines that term. Krilich has not argued that the Guidelines were incorrectly applied in either his or Sarallo's case. In exchange for Sarallo's cooperation, the prosecutor refrained from charging his most serious offenses. That decision greatly reduced Sarallo's sentence but should not redound to the benefit of the uncooperative Krilich. As for the difference between Krilich's sentence and the penalties imposed more than 10 years

ago on state judges who received bribes: if pre-Guidelines sentences under a regime allowing great judicial discretion (and thus great disparity) were allowed to influence the current sentencing mechanism, the Guidelines would be defeated. Sentences today depend on the Guidelines, not on how pre-Guideline cases were handled. *United States* v. *Fonner*, 920 F.2d 1330, 1335 (7th Cir.1990).

The convictions are affirmed. The judgment is vacated, and the case is remanded for resentencing.

RIPPLE, Circuit Judge, concurring in part and dissenting in part.

I agree with the opinion of Chief Judge Politz in *United States* v. *Devoll*, 39 F.3d 575, 579 (5th Cir.1994), that 18 U.S.C. § 1014 applies only to lending activities by the financial institutions protected by the statute. Contrary to the implication in the majority opinion, *Devoll* does not stand alone and in opposition to the positions of several other circuits. Notably, each of the cases that has applied the statute has dealt with a situation involving the protected bank's function of extending credit. See *United States* v. *Yung Soo Yoo*, 833 F.2d 488, 489 (3d Cir.1987) (defendant convicted of "making false statements to a federally insured bank in order to influence its action on a commitment"); *United States* v. *Bonnette*, 781 F.2d 357, 359 (4th Cir.1986) (crediting defendant's account on basis of "sight draft with auto title attached"); *United States* v. *Tucker*, 773 F.2d 136, 139 (7th Cir.1985) (whether a letter of credit is within the scope of the statute); *cf. United States* v. *Erskine*, 588 F.2d 721, 722 (9th Cir.1978) (holding that the "elements of a section 1014 violation include these requisite mental states: knowledge of falsity, and the intent to influence action by the financial institution concerning a loan or one of the other transactions listed in the statute"). All of these cases are in harmony with the

Supreme Court's explicit determination that the statute was designed to provide "penalties for making false statements or reports in connection with loans or other similar transactions. *Williams* v. *United States*, 458 U.S. 279, 289-90 (1982) (quoting H.R.Rep. No. 91- 1556 at 35 (1970), U.S. Code Cong. & Admin. News at 5582).

The funds held by the bank in this case involved no extension of credit. Therefore, the statute is inapplicable, and the convictions based on this section ought to be reversed.

In all other respects, I join the judgment and opinion of the court.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 02-1445

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT R. KRILICH, SR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 94 CR 419 David H. Coar, *Judge*

January 27, 2003

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

ORDER

Defendant-appellant filed a petition for rehearing and rehearing en banc on January 14, 2003. No judge in regular active service has requested a vote on the petition for rehearing

en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Flaum did not participate in the consideration of the matter.

Supreme Court, U.S.
FILED
SEP 2 2003
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No. 03-16

In the Supreme Court of the United States

ROBERT R. KRILICH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1014—which prohibits, among other things, any false statement "for the purpose of influencing in any way" the action of a federally insured bank on "any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan"—prohibits a false statement in an application for the disbursement of funds held in trust by a covered bank that could be liable for disbursing the funds in violation of the trust agreement.

2. Whether, after the court of appeals remanded for resentencing under a mandate directing that petitioner be sentenced within a specific Sentencing Guidelines range, the district court properly declined to impose a sentence outside that range based on asserted changed circumstances.

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In the Supreme Court of the United States

No. 03-16

ROBERT R. KRILICH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals affirming petitioner's sentence (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 53 Fed. Appx. 788. The opinion of the court of appeals vacating petitioner's sentence and remanding for resentencing (App., *infra*, 1a-8a) is reported at 257 F.3d 689. The opinion of the court of appeals affirming petitioner's convictions, vacating the judgment, and remanding for resentencing (Pet. App. 11a-30a) is reported at 159 F.3d 1020. The order and opinion of the district court imposing sentence after the second remand (Pet. App. 3a, 4a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2002. A petition for rehearing was

denied on January 27, 2003 (Pet. App. 31a-32a). On April 18, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including June 26, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois on 14 counts of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014, and on one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d). The jury also returned a forfeiture verdict. Petitioner was sentenced to 64 months of imprisonment and ordered to pay a $1 million fine. He forfeited assets totaling $8,670,097.62. The court of appeals affirmed the convictions, vacated the judgment, and remanded for resentencing. This Court denied certiorari.

On remand, the district court sentenced petitioner to 87 months of imprisonment. The court of appeals again vacated the sentence, with instructions to the district court to impose a sentence in the range of 135 to 168 months. This Court again denied certiorari.

On remand, the district court sentenced petitioner to 135 months of imprisonment. The court of appeals affirmed.

1. a. In 1985, petitioner, a real estate developer, financed several construction projects with funds derived from municipally sponsored debt instruments known as Industrial Revenue Bonds (IRBs). The interest on IRBs was exempt from federal taxation. For that reason, investors accepted a lower return than on

taxable investments, and the developer was able to borrow funds at a below-market rate. Once a local unit of government approved the issuance of IRBs, they were sold to investors and the proceeds were placed with a trustee, who held the money and invested it in an interest-bearing account until the developer needed it to build the project for which the bonds were issued. From the interest earned on the proceeds, the investors were paid a set rate of return, and any excess amounts, referred to as "arbitrage," could be used by the developer for costs directly related to the project. In this case, the trustee banks for the bond proceeds and arbitrage funds were the First Tennessee Bank National Association and the LaSalle National Bank, which are both federally insured financial institutions. 97-2721 Gov't C.A. Br. 1-2, 9-10.

Tax and legal requirements, as well as the bond agreements, specifically limited the uses to which the bond proceeds and the arbitrage funds could be put. The restrictions served to protect the investors and to ensure the bonds' tax-free status. To obtain disbursements of arbitrage funds, petitioner had to submit written requisitions to the trustee banks identifying who and how much was to be paid. Petitioner also had to certify to the trustee and bond counsel that the costs were properly incurred for the project for which the bonds were issued, that the costs had not been the subject of a prior disbursement, and that 90% of the funds used thus far had been used for "good costs," as defined in the bond indenture. Based on the statements in the requisitions and certifications, the bank would disburse the funds either to petitioner or to the listed vendor. The banks relied on the statements made in the requisitions and certifications in disbursing the arbitrage funds. The banks could be liable if money

were paid for costs not covered under the bond indenture or if funds were expended in excess of the tax code's limits. 97-2721 Gov't C.A. Br. 10-11.

Petitioner caused false invoices and certifications to be submitted to the trustee banks to obtain arbitrage funds for impermissible purposes, such as a payment on his yacht, the purchase of a Corvette, and the payment of other expenses unrelated to the development projects for which the bonds were issued. Petitioner's role in the falsification of those invoices and certifications formed the basis of his convictions under 18 U.S.C. 1014. 97-2721 Gov't C.A. Br. 3, 9-12.

b. Petitioner's conviction for RICO conspiracy was based on several acts of bribery and mail fraud. In 1983, petitioner paid the mayor of Oakbrook Terrace, Illinois, $5000 to obtain a zoning change for petitioner's land without the involvement of the zoning board of appeals or the city council. The zoning change, which was made by substituting a new plat for petitioner's original plat, required the signatures of the mayor and the city clerk. Although the city clerk repeatedly refused to sign the papers legitimizing the new plat because the required procedures had not been followed, the mayor completed the deal by obtaining the signature of the deputy city clerk while the city clerk was on vacation. 97-2721 Gov't C.A. Br. 3-9.

In 1984, petitioner agreed to pay the same mayor $40,000 to arrange for his municipality to sponsor the issuance of IRBs to finance one of petitioner's development projects. Petitioner concealed the bribe by arranging for the mayor's son, Andy Sarallo, to win a $40,000 prize in a staged (and insured) hole-in-one golf contest. Petitioner met with the mayor and his sons before the contest and assured them that Sarallo would win the prize on the ninth hole. In keeping with

applicable insurance requirements, there were two spotters at that hole: John Hilgenberg, an employee of the golf course, who was at the tee; and Kim Plencner, one of petitioner's employees, who was on the green. Before Sarallo's foursome reached the ninth hole, petitioner instructed Hilgenberg to leave for lunch. As the foursome approached the hole, petitioner obtained one of Sarallo's golf balls and instructed him and his companions to start screaming after Sarallo teed off, as if he had made a hole-in-one. Petitioner then went to the ninth green and dropped the ball in the hole. The members of Sarallo's foursome and the "spotters" (Plencner and petitioner) falsely acted as if a hole-in-one had been made, even though Sarallo's ball had never reached the green. Sarallo was then awarded the $40,000 prize, an amount that petitioner fraudulently recovered under a special contest-related insurance policy. 97-2721 Gov't C.A. Br. 4-7.

2. a. A jury found petitioner guilty of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014, and RICO conspiracy, in violation of 18 U.S.C. 1962(d). In imposing sentence, the district court applied the Guideline for bribery. A provision of that Guideline, Sentencing Guidelines § 2C1.1(b)(2)(A), required an increase in the offense level under the then-applicable Guideline for fraud and deceit, Sentencing Guidelines § 2F1.1(b)(1), based on the value of the bribes, the benefit received in return for the bribes, or the loss to the victim from the bribes, whichever was greatest. The court found that the benefit to petitioner was between $5 million and $10 million, that this amount was greater than the value of the bribes or the loss to the victim, and that his offense level should therefore be increased by 14 levels. The court then departed downward by seven levels, based on its con-

clusion that the bribes had caused no one a loss and its belief that imposing sentence within the Guidelines range would create a disparity between petitioner's sentence and the sentences of other public-corruption defendants, including the mayor bribed by petitioner. The court sentenced petitioner to 64 months of imprisonment. Pet. App. 12-13a, 24a- 29a.

b. Petitioner and the government both appealed. The court of appeals affirmed petitioner's convictions, but vacated his sentence and remanded for resentencing. Pet. App. 11a-30a.

In his appeal, petitioner claimed that the convictions under Section 1014 were invalid, because the withdrawals of the trust funds were not lending transactions and Section 1014 applies only to false statements made to obtain loans or other extensions of credit. The court of appeals disagreed. Pet. App. 19a-24a. "The text of the statute," the court explained, "is straightforward and broad: it applies to 'any' statement made for the purpose of influencing in 'any' way the action of 'any' of the covered institutions in 'any' application." *Id.* at 21a. The court also observed that Section 1014 specifically covers misstatements to a variety of institutions that do not make loans, and concluded that, "[i]f their inclusion in the statute is to have meaning, then § 1014 *must* cover statements that are not designed to influence an extension of credit." *Id.* at 22a. In an opinion concurring in part and dissenting in part (*id.* at 29a-30a), Judge Ripple agreed with petitioner's view that Section 1014 "applies only to lending activities by the financial institutions protected by the statute" (*id.* at 29a).*

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* In addition to rejecting petitioner's interpretation of Section 1014, the court of appeals held that statements made by petitioner

In its cross-appeal, the government claimed that the district court had misapplied the Sentencing Guidelines. The court of appeals agreed. It held that the district court had relied on impermissible grounds in departing downward and directed the court to recalculate the benefit to petitioner from his bribes and then decide whether a departure was warranted on the ground that the resulting offense level overstated the seriousness of petitioner's conduct. Pet. App. 24a-29a.

c. Petitioner filed a petition for a writ of certiorari, raising two questions: whether the court of appeals had correctly interpreted Section 1014, and whether the district court had permissibly admitted petitioner's proffer statements at trial. See 98-1715 Pet. i, 9-20. This Court denied review. *Krilich* v. *United States*, 528 U.S. 810 (1999).

3. a. On remand, the district court found that the gain from petitioner's offenses was approximately $14 million, which added 15 levels to his offense level and yielded a Guidelines range of 135 to 168 months' imprisonment. The court concluded that the offense level did not significantly overstate the seriousness of petitioner's crimes and declined to depart on that ground. The court did grant a five-level downward departure, however, based on petitioner's age-related medical problems. As a result of the departure, petitioner's Guidelines range was 78 to 97 months' imprisonment. The court sentenced petitioner to a prison term of 87 months. App., *infra*, 2a-5a.

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as part of a proffer during plea negotiations had been properly admitted at trial (Pet. App. 13a-17a); rejected petitioner's contention that the evidence of one of his bribes was insufficient as a matter of law (*id.* at 17a-18a); and held that a variance between a date charged in the indictment and the date proved at trial was harmless error (*id.* at 18a-19a).

b. Both petitioner and the government appealed again. The court of appeals rejected petitioner's challenges to the district court's calculation of his gain and the court's conclusion that it did not significantly overstate the seriousness of his crimes. App., *infra*, 3a-4a. The court of appeals also rejected the government's argument that a downward departure based on petitioner's medical condition was barred by the terms of its remand, observing that "changed circumstances are a standard reason for consideration of additional issues on a remand." *Id.* at 5a. The court agreed with the government, however, that the district court had abused its discretion in departing downward, because Sections 5H1.1 and 5H1.4 of the Guidelines permit a departure based on a defendant's medical condition only if it is "debilitating" or "extraordinary," and petitioner's condition was neither. *Id.* at 5a-8a. The court of appeals thus vacated petitioner's sentence again, and remanded the case "with instructions to impose a sentence in the range of 135 to 168 months." *Id.* at 8a.

c. Petitioner again filed a petition for a writ of certiorari, this time raising two different questions: whether the district court had erred in calculating the benefits to petitioner from his bribes, and whether the court of appeals had erred in reversing the district court's downward departure. See 01-1108 Pet. i, 9-26. This Court again denied review. *Krilich* v. *United States*, 534 U.S. 1163 (2002).

4. a. On remand, petitioner filed a new motion for a downward departure, arguing that his medical condition had deteriorated since the previous resentencing. The district court found that petitioner did not satisfy the requirements for a departure on this ground, because he was not bedridden, he did not need constant care, the care he did need was available in prison, and

he could not establish that imprisonment would shorten his life. The court therefore denied the motion and sentenced petitioner to 135 months' imprisonment. Pet. App. 4a-10a.

b. Petitioner appealed again. In an unpublished two-paragraph order, the court of appeals affirmed. Pet. App. 1a-2a. Noting that it had remanded the case after petitioner's most recent appeal with instructions to impose a sentence between 135 and 168 months, the court held that its remand "did not permit the presentation of evidence or legal theories supporting a different [Guidelines] range," and that the district court therefore had no authority to "impose a sentence lower than the one [petitioner] received." *Id.* at 2a.

ARGUMENT

1. Petitioner renews a claim (Pet. 16-21) he raised in his first certiorari petition (98-1715 Pet. 9-15): that 18 U.S.C. 1014 applies only to false statements made to influence lending or other credit transactions, and that the court of appeals' contrary conclusion on petitioner's first appeal was erroneous. This Court determined that this issue did not warrant further review when it denied petitioner's first petition, and there is no reason for a different result now.

a. Section 1014 prohibits, among other things, the making of "any false statement" for the purpose of "influencing in any way" the action of "any institution the accounts of which are insured by the Federal Deposit Insurance Corporation" on "any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." 18 U.S.C. 1014. Petitioner's conduct falls squarely within that prohibition. He caused false statements to be made for the purpose of influencing the banks' actions on

applications and commitments relating to the disbursement of IRB funds. As a result of those misrepresentations, funds were disbursed for purposes inconsistent with the tax-exempt status of the IRBs. Had petitioner told the banks the truth about the uses to which those funds would be put, the banks would have been obligated to deny the disbursements. As a bank officer testified at trial, the banks "would certainly be open to liability if [they] paid out money for costs that weren't qualified under the indenture," because the tax-exempt status of the bonds would have been subject to termination. Tr. 570.

Petitioner would limit the unqualified language of Section 1014 to false statements made in an application for a loan or credit. There is no merit to that position. The statute enumerates a long list of the types of transactions covered, and a loan is only one item on that list. Adopting petitioner's reading would render the other enumerated terms superfluous. See *United States* v. *Pinto*, 646 F.2d 833, 838 (3d Cir.) ("If 'advance' was only to refer to a loan, the term 'advance' would be rendered meaningless."), cert. denied, 454 U.S. 816 (1981); see also *United States* v. *Erskine*, 588 F.2d 721, 722 (9th Cir. 1978) (Kennedy, J.) (Section 1014 applies to "a loan or one of the other transactions listed in the statute"). If petitioner's construction were correct, there would also be no rational explanation for Congress's decision to include within Section 1014's scope false statements made to institutions such as the Federal Reserve banks, the Office of Thrift Supervision, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, and the National Credit Union Administration Board. As the court of appeals observed, "[n]one of

these institutions makes loans," and "[i]f their inclusion in the statute is to have meaning, then § 1014 *must* cover statements that are not designed to influence an extension of credit—indeed, must cover statements that have nothing to do with the payment of money." Pet. App. 22a. This Court has rejected efforts to limit the scope of Section 1014 with qualifications that do not appear in the text of the statute. See *United States* v. *Wells*, 519 U.S. 482, 490 (1997) (false statement need not be material, since text does not contain materiality requirement).

b. Petitioner contends (Pet. 16-19) that this Court should grant certiorari to resolve what he characterizes as a "square conflict" (Pet. 16) between the court of appeals' decision and the Fifth Circuit's decision in *United States* v. *Devoll*, 39 F.3d 575, 578 (1994), cert. denied, 514 U.S. 1067 (1995). Petitioner is mistaken. Although some of the language in *Devoll* is inconsistent with the court of appeals' reasoning in this case, no true conflict has yet developed. And even if there were a conflict, the unusual factual setting would make this case a poor vehicle for attempting to resolve it.

The defendant in *Devoll* appears to have argued, not that his misrepresentations lacked a connection to a lending transaction, but that the district court committed plain error in failing to instruct the jury that such a connection was an element of the offense. With little analysis, the court of appeals held that the district court had committed error, because "section 1014 applies only to actions involving lending transactions." 39 F.3d at 580. The court nonetheless affirmed the defendant's conviction, finding that the error was not "plain" and that, in any event, it did not affect his substantial rights, because there was "ample evidence" that his false statements did in fact arise in the context

of lending activities. *Id.* at 581. Petitioner cites no case, and the government is aware of none, in which a court of appeals has reversed a conviction or affirmed the dismissal of an indictment on the ground that Section 1014 is limited to lending activities.

Nor is it clear that the Fifth Circuit would find Section 1014 inapplicable on the peculiar facts of this case. The opinion in *Devoll* suggests that the court was principally concerned with avoiding Section 1014's application to "fraud or false representations having nothing to do with financial transactions, such as fraud in an employment contract or, for example, in a contract to provide goods or services for custodial care, premises repair, or renovation." 39 F.3d at 580. This is not such a case. Petitioner made false statements in applications for the disbursement of trust funds administered by banks, which could be held liable if they disbursed the funds in violation of the terms of the trust. Petitioner's conduct thus directly involved "financial transactions" (*ibid.*), and allowing the government to prosecute him for that conduct serves Section 1014's purpose of insulating such transactions from false statements intended to influence the institution's conduct. Even if the statute were construed (as petitioner proposes) to exclude false statements "unrelated to lending transactions" (Pet. i), this case would still fall within the statute, because it does involve borrowed funds (*i.e.*, funds that were borrowed from the issuers of the IRBs). Although the bank was not itself the lender, it played a central role in implementing the lending arrangement and took on financial exposure for improper release of the funds.

c. There is no merit to petitioner's contention (Pet. 19-21) that the court of appeals' decision is inconsistent with this Court's decision in *Williams* v. *United States*,

458 U.S. 279 (1982). In *Williams*, the Court held that depositing bad checks does not involve the making of a "false statement" under Section 1014, because "a check is not a factual assertion," and therefore "cannot be characterized as 'true' or 'false.'" *Id.* at 284. Examining the legislative history to determine whether it would permit a broader reading of Section 1014 than the statute's text, the Court found that it would not, because the only applicable legislative history focused on "representations made in connection with conventional loan or related transactions." *Id.* at 288-289. Despite petitioner's suggestion to the contrary (Pet. 20-21), that observation does not support a deviation from the unambiguous statutory language addressing the very different issue presented here. See *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (ambiguity of one aspect of statute does not render rest of statute ambiguous). Although the legislative history did focus on "conventional loan or related transactions" (458 U.S. at 289), this Court has made clear that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute." *Brogan* v. *United States*, 522 U.S. 398, 403 (1998).

d. Petitioner contends that, while there may have been reason to deny review when he filed his first certiorari petition, review is warranted now, because, he says, the circuit conflict has "grown more substantial" in "the intervening four years," as "other circuits have embraced the Seventh Circuit's reading of Section 1014." Pet. 19. While two other courts of appeals have followed the Seventh Circuit's decision in this case, see *United States* v. *Boren*, 278 F.3d 911, 914-916 (9th Cir.

2002); *United States* v. *Wade*, 266 F.3d 574, 579-581 (6th Cir. 2001), cert. denied, 535 U.S. 964 (2002), no court of appeals has ever followed the Fifth Circuit's decision in *Devoll*, either before or after petitioner's first certiorari petition was denied. Thus, just as there was no true circuit conflict concerning the meaning of Section 1014 at the time of petitioner's first petition, there is no such conflict today.

2. Petitioner also contends (Pet. 9-16) that the court of appeals erred in holding, in his most recent appeal, that the district court was not permitted to impose a sentence outside the Sentencing Guidelines range specified in the mandate from the previous appeal. He asks this Court to resolve an asserted circuit conflict on whether, in resentencing a defendant after a remand, a district court may consider circumstances that have changed since the time of the initial sentencing. As explained below, this is not an appropriate case to address that question. Review by this Court is therefore unwarranted.

Under 28 U.S.C. 2106, a court of appeals may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of the court whose decision it is reviewing, and may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." In addition, the statute governing sentencing appeals, 18 U.S.C. 3742, provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. 3742(f)(1), (2)(A), and (B). It is thus well settled that, when a court of appeals reverses the judgment in a criminal case, it may limit the scope of the proceedings on remand. See, *e.g.*, *United States*

v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997); *United States* v. *Santonelli*, 128 F.3d 1233, 1238 (8th Cir. 1997); *United States* v. *Webb*, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995). It is also well settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, *e.g.*, *Moore*, 131 F.3d at 598; *Webb*, 98 F.3d at 587; *United States* v. *Tamayo*, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); *Polland*, 56 F.3d at 777-779; *Pimentel*, 34 F.3d at 800; *United States* v. *Bell*, 5 F.3d 64, 66 (4th Cir. 1993). The court of appeals applied that "mandate rule," finding that its narrow remand to the district court "with instructions to impose a sentence in the range of 135 to 168 months" did not permit "the presentation of evidence or legal theories supporting a different range." Pet. App. 2a.

The vast majority of the court of appeals decisions on which petitioner relies (see Pet. 11-14) are not inconsistent with that ruling. Many did not even involve a resentencing after a remand. See *United States* v. *Rudolph*, 190 F.3d 720 (6th Cir. 1999); *Werber* v. *United States*, 149 F.3d 172 (2d Cir. 1998); *United States* v. *Core*, 125 F.3d 74 (2d Cir. 1997), cert. denied, 522 U.S. 1067 (1998); *United States* v. *Sally*, 116 F.3d 76 (3d Cir. 1997); *Puente* v. *United States*, 676 F.2d 141 (5th Cir. 1982). One did involve such a resentencing but did not address the question whether the district court was permitted to consider changed circumstances. See *United States* v. *Akrawi*, 982 F.2d 970 (6th Cir. 1993). Still others did address that question but were cases where the defendant was resentenced after a remand

that either was not limited or was not as limited as the one here, which required the imposition of a sentence within a particular Guidelines range. See *United States* v. *Quintieri*, 306 F.3d 1217, 1226 (2d Cir. 2002) (because there "may have been improper double counting," court "*remand[ed] to the district court for resentencing in light of this order*, without prejudice to the government submitting an argument to the district court explaining why th[ere] was not double-counting"), cert. denied, 123 S. Ct. 2246 (2003); *United States* v. *Bryce*, 287 F.3d 249, 252 (2d Cir.) ("the case was remanded for 'resentencing'"), cert. denied, 537 U.S. 884 (2002); *United States* v. *Bradstreet*, 207 F.3d 76, 78 (1st Cir. 2000) (court "ruled that the district court had erred in granting the departure, vacated the sentence, and remanded for resentencing"); *United States* v. *Rhodes*, 145 F.3d 1375, 1377 (D.C. Cir. 1998) (court "remanded * * * to the district court 'for possible resentencing taking into account the provisions of [Sentencing Guidelines] § 2D1.1(b)(1)'").

Petitioner cites only two decisions, both from the Second Circuit, that are arguably inconsistent with the court of appeals' decision. In one, *United States* v. *Bryson*, 229 F.3d 425 (2000), the Second Circuit held that a "remand [directing] that [the defendant] be resentenced 'according to his original offense level of 31' * * * did not preclude a departure based on intervening circumstances." *Id.* at 426. In the other, *United States* v. *Carpenter*, 320 F.3d 334 (2d Cir. 2003), the court permitted a departure based on changed circumstances despite a mandate directing the district court to resentence the defendant "at a base offense level of 15 and a criminal history category of I, which carries a sentencing range of 18-24 months," or, if the defendant was granted an additional one-level reduction for acceptance of responsibility, "at a base offense

level of 14 and a criminal history category of I, which carries a sentencing range of 15-21 months." *Id.* at 337. Even if the court of appeals' decision can be said to be inconsistent with these two decisions, however, there are at least four independent reasons why further review is not warranted.

First, the question on which the Seventh Circuit and the Second Circuit arguably disagree is whether, when a court of appeals remands for imposition of a sentence within a particular Guidelines range, a district court may depart from that range on the basis of circumstances that have changed since the time of the previous sentencing. That question is quite narrow and is unlikely to arise with much frequency.

Second, any conflict created by the court of appeals' decision is insufficiently developed to justify this Court's intervention. Only one circuit has issued decisions with which the court of appeals' decision arguably conflicts; both of those decisions are less than three years old; the court of appeals' decision was issued by unpublished order, and thus does not bind future panels of the Seventh Circuit, see 7th Cir. R. 53; and the published decision on which the court of appeals relied (see Pet. App. 2a) was a civil case, *Barrow* v. *Falck*, 11 F.3d 729 (7th Cir. 1993), which held that a remand with instructions to award attorneys' fees within a certain range did not permit an award outside that range. Indeed, in an earlier appeal in this very case, the Seventh Circuit permitted petitioner to rely on the asserted deterioration in his medical condition as a basis for urging a downward departure, notwithstanding a remand for resentencing that made no mention of that factor. See App., *infra*, 5a ("changed circumstances are a standard reason for consideration of additional issues on a remand") (citing *United States* v.

Buckley, 251 F.3d 668 (7th Cir. 2001)). The result in this case may therefore reflect only the court's reaction to petitioner's continued effort to relitigate a medical-departure ground that had already been rejected on appeal.

Third, in the context of downward departures, the "changed circumstances" rule that petitioner espouses must now be considered in light of the language of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. As petitioner notes (Pet. 14 n.7), that Act (§ 401(e), 117 Stat. 671) amends 18 U.S.C. 3742 to forbid departure on a remand for resentencing except on a ground that was both "specifically and affirmatively included in the written statement of reasons * * * in connection with the previous sentencing" and "held by the court of appeals, in remanding the case, to be a permissible ground of departure." 18 U.S.C. 3742(g)(2). The courts of appeals have not yet had the opportunity to consider whether this language supersedes any "changed circumstances" rule with respect to new departure grounds.

Fourth, petitioner would not be entitled to relief even under the rule he asks this Court to adopt. The district court denied petitioner's motion for a downward departure, not on procedural grounds (*i.e.*, because it believed it was not permitted to impose a sentence outside the Guidelines range identified in the mandate), but on the merits (*i.e.*, because it found that petitioner's evidence did not satisfy the legal requirements for the departure he sought). Pet. App. 4a-10a. That decision would likely have been upheld on appeal even if the court had not applied the rule to which petitioner objects, because "discretionary decisions not to depart are not reviewable." *United States* v. *Egwaoje*, 335

F.3d 579, 588 (7th Cir. 2003) (quoting *United States* v. *Chavez-Chavez*, 213 F.3d 420, 421 (7th Cir. 1993)). (Contrary to petitioner's assertion (Pet. 6-7, 16), the district court did not apply an incorrect legal standard in denying his departure motion; it applied the standard set forth by the Seventh Circuit on the previous appeal, compare Pet. App. 7a with App., *infra*, 6a-8a.) Thus, even if a defendant is entitled to consideration of changed circumstances at his resentencing, that is precisely what petitioner received.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2003

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-3971, 00-4066, 00-4221

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE, CROSS-APPELLANT

v.

ROBERT R. KRILICH, SR.
DEFENDANT-APPELLANT, CROSS-APPELLEE

Submitted: Mar. 10, 2001*
Decided: July 16, 2001
Rehearing and Rehearing En Banc
Denied: Aug. 13, 2001**

Before EASTERBROOK, RIPPLE, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

Robert Krilich's criminal case is on appeal for a third time. He has been convicted of racketeering and other offenses related to a scheme that included bribery of public officials in order to obtain assistance in the approval and financing of construction projects. In 1998

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* These cross-appeals have been submitted under Operating Procedure 6(b) to the panel that decided prior appeals in the case. The panel has concluded that additional oral argument is unnecessary.

** Judge WILLIAMS did not take part in the consideration of the petition for rehearing en banc.

we affirmed Krilich's convictions but on the United States' cross-appeal remanded for resentencing. See *United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998). See also *United States v. Krilich*, 178 F.3d 859 (7th Cir. 1999) (reversing an order releasing Krilich on bail). Krilich's original sentence was 64 months' imprisonment. On remand the district court imposed a sentence of 87 months. Once again, both sides complain.

What occasioned the remand is a dispute about the application of the table in U.S.S.G. § 2F1.1(b)(1) to add levels to the calculation of Krilich's offense severity. One aspect of Krilich's offense was co-opting a local government to sponsor tax-free industrial revenue bonds, some proceeds of which were used to finance a project (and other proceeds of which were diverted to Krilich's personal benefit). The prosecutor argued that the gain to Krilich from this offense should be measured by the difference between what he paid in interest on the bonds, and the higher payments that would have been necessary had the interest been taxable to the investors (as it should have been). The district judge did not resolve the parties' dispute about valuation, ruling instead that no matter how the matter came out he would allow only seven levels from this table, departing on the authority of Application Note 7(b) to § 2F1.1. (This has become Note 8(b) in the latest version of the Guidelines, but we use the former numbering for consistency with our prior opinions.) We held that this procedure was unauthorized and remanded for the imposition of a sentence based on the table in § 2F1.1(b)(1). 159 F.3d at 1029-31. Although downward departure could not be excluded as a possibility, we held, the procedure must start with an accurate calculation.

A different district judge imposed sentence on remand. After a hearing that lasted almost three weeks, the court concluded that the gain Krilich had reaped by offering tax-free bonds (and correspondingly the loss to the Treasury) was approximately $14 million, which added 15 offense levels under the table in § 2F1.1. This produced a total offense level of 32 and a presumptive sentencing range of 135 to 168 months' imprisonment. The judge concluded that the offense level of 32 did not "significantly overstate" the seriousness of Krilich's crime, and the court therefore held that departure under Application Note 7(b) is unwarranted. Nonetheless, the court granted Krilich a significant downward departure of five offense levels for health reasons. The level 27 sentencing range is 78-97 months, and the district judge chose a sentence in the middle of that range. Krilich contends that his sentence is too high, the United States that it is too low.

Krilich contests every aspect of the district court's findings. His principal contention is that the $14 million figure for his gain (and the Treasury's loss) is flawed because it supposes that he would have raised the same amount of money with taxable bonds had he lacked access to tax-free instruments. Higher interest rates could have led to a change of plans, for demand curves slope downward and an increase in the price of one project leads an entrepreneur like Krilich to shift to another. That much cannot be denied, but the Guidelines do not determine a wrongdoer's gain based on what-if scenarios. Imagine a bank robber who argues that, had he known about the presence of a guard, he would have robbed a grocery store instead and thus caused a lower loss. It is hard enough to tote up the gains and losses from crimes actually committed

without pursuing second-best solutions, which are usually indeterminate. The gain and loss rules in the Guidelines call for approximations, not exact figures. See § 2F1.1 Application Note 8 (now Note 9). Krilich did get access to tax-free bonds, raising $135 million that he held for 12 years. Some of this money he used for construction or consumption, and the rest he reinvested at higher interest. A similar kitty lent by investors who had to pay taxes on interest would have cost Krilich much more than what he actually paid in interest. Under the Guidelines the buck stops there. The district court's finding that the gain was $14 million is supported by the record (which includes the calculations of an expert in finance) and cannot be called a clear error. None of Krilich's other objections to the conclusion that his gain exceeds $10 million is persuasive; we see no need to add to the district court's analysis. And Krilich's contention that the district court should have departed under Application Note 7(b) goes nowhere; the judge understood the existence of (and limits on) that authority, and the decision that this is not an appropriate occasion for departure cannot be reviewed by this court. *United States v. Franz*, 886 F.2d 973 (7th Cir. 1989).

At the time of the resentencing hearing early in 2000, Krilich was 69 years old and had age-related medical problems. The district court concluded, on the basis of a psychiatrist's testimony (yes, a psychiatrist; no cardiologist testified), that Krilich has four physical infirmities: chronic cardiovascular disease, chronic peripheral vascular disease with hypertension, obstructive pulmonary disease, and lower back pain of lumbar and lumbosacral origin. The court gave Krilich a one-level

departure for each of these four, and a fifth level for the four in combination.

The United States' argument that consideration of this subject was barred by the terms of our remand is not correct. The district court found that Krilich's medical condition had deteriorated since his original sentencing, and changed circumstances are a standard reason for consideration of additional issues on a remand. See *United States v. Buckley*, 251 F.3d 668 (7th Cir. 2001). It remains necessary, however, to determine whether the district judge abused his discretion.

The judge acknowledged that none of the four physical problems would justify a departure standing alone but believed that the combination does so:

> I specifically do not find that . . . the Bureau of Prisons is unable to adequately treat the defendant's ailments. Nevertheless, contrary to the government's position, the defendant presented a medical profile outside the heartland of people remanded to the custody of the Bureau of Prisons. . . . Krilich's health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult. Therefore, a departure is warranted. . . . [These conditions create] treatment and quality of life difficulties that fall outside the heartland.

The judge reached this conclusion despite finding that "there is no structural reason why Krilich cannot receive adequate care within the [Bureau of Prisons]". Ten months after announcing the 87-month sentence, the district court held another hearing at which Krilich

argued, with the support of two cardiologists (neither of whom had examined him or was familiar with the medical care available in federal prisons), that an even greater departure was warranted. This hearing was unauthorized, because the district judge no longer had the authority to alter Krilich's sentence, see 18 U.S.C. § 3582(c) and Fed. R. Crim. P. 35, but was harmless, for the judge ultimately concluded that the cardiologists had added nothing to what was already in the record.

Relying on U.S.S.G. § 5H1.4, the United States contends that an "unusual [medical] profile" is not a valid ground for departure. Section 5H1.1 says that age may not be the basis of departure unless the defendant is "elderly and infirm", referring for further guidance to § 5H1.4, which provides:

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Does Krilich have an "extraordinary physical impairment"? Is he "elderly and infirm" or "seriously infirm"? The district court did not find so; instead the judge apparently believed that any "unusual" medical condition or combination of conditions justifies a departure. That can't be reconciled with the first sentence of § 5H1.4. "Extraordinary" is a subset of "unusual." We have held that the limit to "extraordinary" conditions

must be taken seriously. See *United States v. Woody*, 55 F.3d 1257, 1275-76 & n.15 (7th Cir. 1995).

Almost everyone is "unusual" in some respect, and many septuagenarians have conditions similar to Krilich's. Yet § 5H1.1 and § 5H1.4 put normal age-related features off limits as grounds for reduced sentences. Older criminals do not receive sentencing discounts. Many persons in poor health are confined in federal prisons. If the medical problem is extraordinary in the sense that prison medical facilities cannot cope with it, then a departure may be appropriate. See *United States v. Sherman*, 53 F.3d 782, 787 (7th Cir. 1995). To justify such a conclusion, however, the court "must ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated." *United States v. Albarron*, 233 F.3d 972, 978 (7th Cir. 2000). Or a bedridden person would be as effectively imprisoned at home as in a jail; the physical condition itself does the imprisoning. But the district court found that the Bureau of Prisons could treat Krilich's conditions, and he is not bedridden, so these rationales for departure are missing.

An ailment also might usefully be called "extraordinary" if it is substantially more dangerous for prisoners than nonprisoners. Then imprisonment would shorten the defendant's life span, making a given term a more harsh punishment than the same term for a healthy person. A district court properly may reduce the sentence's *length* when necessary to equalize *severity*. See *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000). Cf. *United States v. Guzman*, 236 F.3d 830 (7th Cir. 2001). The district judge not only did not make such a finding for Krilich but also believed that this

finding could not be sustained. Approximately 4,000 persons in federal custody receive care for cardiovascular conditions, and no evidence of record demonstrates that they exhibit greater mortality than free persons with these conditions.

The Bureau of Prisons can provide Krilich with the medical regimen (which is to say, the drugs and diet) that his physicians believe to be appropriate. That the Bureau has not provided (and does not propose to provide) the quality of care that top private specialists provide is neither here nor there; wealthy defendants can afford exceptional care, but this does not curtail the punishment for their crimes. Krilich did not establish that his condition is either "debilitating" or "extraordinary," and a departure therefore conflicts with norms established by § 5H1.1 and § 5H1.4. A generic statement that a defendant's circumstances are out of the "heartland" may not be used to override limitations written into the Guidelines. See *Koon v. United States*, 518 U.S. 81, 92-96, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996); *Krilich*, 159 F.3d at 1030. Krilich's sentence therefore is again vacated, and the case is remanded with instructions to impose a sentence in the range of 135 to 168 months.

(3)

Supreme Court, U.S.
FILED
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No. 03-16

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner's case squarely implicates a deep circuit split over the degree to which district courts may consider circumstances arising since a defendant's original sentencing when resentencing that defendant. The government concedes that a split exists but tries to minimize it and describes this case as a poor vehicle for its resolution. In fact, at least ten courts of appeals have weighed in on this critical issue with irreconcilable rules for resentencing courts. And none of the government's proposed reasons for deferring this case to a later day provides any logical grounds for delay.

This case also presents an intractable circuit conflict over the question of whether 18 U.S.C. § 1014 criminalizes false statements that do not relate to lending transactions. The Seventh Circuit held that it does, but acknowledged that this position is diametrically opposed to that of the Fifth Circuit. Other circuits have since taken the Seventh Circuit's position. This Court should grant certiorari to correct the resulting disparate treatment of criminal defendants in different parts of the country and to resist federal encroachment on the traditional state prerogative of fraud prosecution.

I. The Courts Of Appeals Are Deeply Divided Over District Courts' Authority To Consider Defendants' Changed Circumstances At Resentencing.

The petition describes a recognized circuit split over the scope of district courts' authority in resentencing criminal defendants. See Pet. 9-16; *United States* v. *DeRiggi*, 893 F. Supp. 171, 180-181 (E.D.N.Y.) (observing circuit split), aff'd, 72 F.3d 7 (2d Cir. 1995) (per curiam). Petitioner showed, specifically, that federal appellate courts have adopted inconsistent rules as to a resentencing court's power to consider ways in which a defendant's circumstances have changed since his original sentencing.

The government does not dispute that the Fourth, Eighth, and Tenth Circuits categorically forbid district courts to consider changed circumstances at resentencing. See Pet. 9-10; see, *e.g.*, *United States* v. *Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994) (even at "fully de novo resentencing," court may only consider "relevant evidence the court could have heard at the first sentencing hearing"). The government claims, however, that some of the decisions petitioner cites on the other side of the split—cases giving district courts broad authority to consider changed circumstances at resentencing—are inapposite because they did not involve *remands* for resentencing or expressly *limited* remands, specifically. See Br. in Opp. 15-16. But this misses the point. The decisions that the government challenges announce sweeping principles about courts' sentencing power and the fairness of considering new facts at resentencing—principles that are not limited to a particular procedural context.

Foremost is the longstanding principle that sentencing is the duty of the trial court, requiring consideration of all the facts and circumstances at the time of sentencing. See *United States* v. *Core*, 125 F.3d 74, 77 (2d Cir. 1997) ("When the trial court undertook to resentence [the defendant] * * * , it was required to consider him as he stood before the court at that time"); accord *Werber* v. *United States*, 149 F.3d 172, 178 (2d Cir. 1998). This idea is reflected in the Sentencing Guidelines, which permit consideration of any factor for which consideration is not expressly barred. See *United States* v. *Rudolph*, 190 F.3d 720, 723 (6th Cir. 1999) (relying on *Koon* v. *United States*, 518 U.S. 81 (1996), for proposition that district courts retain discretion to consider anything—including changes since original sentencing—that Sentencing Commission and Congress do not proscribe); accord *United States* v. *Bryce*, 287 F.3d 249, 253 (2d Cir. 2002).

From this foundation emerges the principle that changed circumstances should not be ignored by a district court in

resentencing a defendant. See *Rudolph*, 190 F.3d at 724 ("'It makes no sense to preclude a sentencing judge from considering facts pertinent to resentencing that had not yet arisen at the time of the original sentence'"); *United States* v. *Sally*, 116 F.3d 76, 80-81 (3d Cir. 1997) (recognizing that under *Koon*, changed circumstances can support sentencing departure); *Puente* v. *United States*, 676 F.2d 141, 145 (5th Cir. 1982) (explaining that "'it is a common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence'").

In contrast, the rule in the Fourth, Eighth, and Tenth Circuits appeals to a different principle: that sentencing disparities among similarly situated defendants should be avoided. See *United States* v. *Sims*, 174 F.3d 911, 912 (8th Cir. 1999) ("[Allowing consideration of post-sentencing conduct] creates a situation in which a few lucky defendants, simply because of a legal error in their original sentencing, receive a windfall"). The majority view, however, questions whether this principle is even at stake. See *United States* v. *Rhodes*, 145 F.3d 1375, 1381 (D.C. Cir. 1998) ("The [Guidelines] seek[ ] to eliminate not *all* sentencing disparities, but only 'unwarranted' disparities. Distinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems 'unwarranted'" (citations omitted)); see also *United States* v. *Bradstreet*, 207 F.3d 76, 82-83 (1st Cir. 2000) (following *Rhodes*); *Rudolph*, 190 F.3d at 724 ("Similarly-situated defendants receive identical sentences, but the comparison cannot persist after a judicial determination that the defendant merits *resentencing*"). In short, in both rationale and application, the courts of appeals are split on the propriety of considering changed circumstances in resentencing.[1]

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[1] Indeed, two Second Circuit decisions the government attempts to distinguish expressly adopt the broad principle that district courts can consider changed circumstances *even following an explicitly limited remand*. See *United States* v. *Quintieri*, 306 F.3d 1217, 1230 (2d Cir.

Ultimately, the government concedes, as it must, that the Seventh Circuit's decision in this case does implicate a circuit split (although the government tries to characterize it as somehow limited to the Second and Seventh Circuits). See Br. in Opp. 16-17. The government cites four reasons why this Court should nevertheless decline to resolve the conflict, but none of these reasons is grounds for denying the petition.

First, the government claims that the question presented only implicates cases where "a court of appeals remands for imposition of a sentence within a particular Guidelines range." Br. in Opp. 17. In fact, however, adopting the majority rule that petitioner espouses would abrogate the rule the Fourth, Eighth, and Tenth Circuits, all of which prohibit courts from considering changed circumstances no matter how broad the remand. The courts openly disagree on a resentencing court's authority to consider changed circumstances. A statement from this Court would affect the vast run of cases in which defendants are resentenced following an appeal or collateral challenge, not merely those cases involving a limited remand.

Second, the government contends that the conflict is "insufficiently developed." Br. in Opp. 17. As explained above and in the petition, however, the split is substantial; three circuits follow a strict rule limiting judicial discretion at resentencing, and six others recognize resentencing courts' power to consider the defendant as he is, including any recent changes. See Pet. 13-14. Nor was the Seventh Circuit's decision in this case anomalous or unrepresentative of that court's approach, as the government suggests. See Br. in Opp.

2002) (resentencing court can consider changed circumstances "following remand even though the remand was 'limited' to a different issue"), cert. denied, 123 S. Ct. 2246 (2003); *Bryce*, 287 F.3d at 253 ("'even where the appellate court remands a case with specific limiting instructions, such a mandate does not "preclude" a departure based on intervening circumstances'").

17-18. As described more fully in the petition (at 10-11), the Seventh Circuit's hybrid approach allows resentencing courts to consider changed circumstances unless they involve issues already resolved in a prior appeal. The court of appeals thus allowed petitioner to argue changed medical circumstances at one point, as the government recognizes (at 17), because that court had yet to address a medical departure in the case. Here, in contrast, the Seventh Circuit denied the district court's authority to consider changed circumstances because that basis for departure was the subject of an earlier Seventh Circuit decision. In short, the court of appeals' decision in this case reflects the court's established rule and squarely implicates the circuit split described in the petition.

Third, the government urges the Court to avoid the question presented until lower courts have had a chance to interpret statutory changes made by the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003. See Br. in Opp. 18. As explained in the petition, however, the Act does nothing to resolve the split over courts' ability to consider changed circumstances at resentencing. See Pet. 14 n.7. The relevant portion of the Act, and its legislative history, show that it was intended to bar district courts from resurrecting sentencing departures, reversed on appeal, under the guise of new legal theories. *Id.* It says nothing about intervening factual changes, as one would expect if Congress intended to resolve the circuit split on this issue. *Id.* In short, the Act is no reason to delay this Court's resolution of an important issue dividing the lower courts.

Finally, the government urges the Court not to resolve this issue because "petitioner would not be entitled to relief even under the rule he asks this Court to adopt." Br. in Opp. 18. But the Seventh Circuit refused to address petitioner's appeal solely because the court believed that the district court was powerless to consider changed circumstances in any event. A ruling from this Court in petitioner's favor would entitle him to the review

he seeks from the Seventh Circuit. Nor would this be an empty exercise. As the petition explains, petitioner has a compelling claim that the district court misunderstood the scope of its discretion by misreading a previous appellate ruling. See Pet. 4-7. Far from following the Seventh Circuit's prior decision, as the government claims (at 19), the district court misread it to conflate two distinct grounds for departure in the Guidelines. Pet. 7. The sentencing court thus erroneously concluded that it had no authority to depart downward notwithstanding petitioner's rapidly declining health—including a life-threatening heart condition that continues to deteriorate.[2] Pet. 4-7. In a circuit adhering to the majority view, the court of appeals would have reviewed this claim on its merits.[3]

II. The Courts Of Appeals Are Deeply Divided Over The Application Of 18 U.S.C. § 1014 To Activities Not Involving Loans Or Credit Applications.

The federal bank fraud statute governs false statements made in "loan and credit applications" to federally insured banking institutions. 18 U.S.C. § 1014 ("Loans and credit applications generally; renewals and discounts; crop insurance"). Petitioner, however, was convicted for activities that involve neither a loan nor a credit application, a result that the Fifth Circuit would reject under *United States* v. *Devoll*, 39 F.3d 575, 580 (1994). The brief in opposition does not dispute the petition's showing that, as a result of the government's

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[2] Petitioner has had three cardiac episodes, one as recently as September 2003, since his last sentencing hearing. All three episodes resulted in petitioner's hospitalization.

[3] As the government itself has recently argued, "[t]he possibility that the court of appeals might arrive at the same judgment after a remand is not a reason for this Court to decline to resolve the important circuit conflict that is squarely presented." Amicus Br. of the United States, *Yates* v. *Hendon*, No. 02-458, at 20 n.7 (May 2003).

expanded invocation of Section 1014, the question presented is important and frequently recurs. The uncertainty regarding the scope of such an important criminal statute is untenable. See Modern Federal Jury Instructions ¶ 37.03 (recognizing "uncertainty as to the scope of section 1014" resulting from the conflict between the decision in this case and the Fifth Circuit's holding in *United States* v. *Devoll*, 39 F.3d 575, 580 (1994)). Nor does the government dispute that the question raises a fundamental issue regarding the balance between federal and state criminal authority, for fraud on a trust is squarely within the domain of state criminal law and prosecution in a context like this one implicates no federal interest.[4] The government's arguments for nonetheless denying certiorari lack merit, and rely primarily on mischaracterizations of the facts of this case and the Fifth Circuit's holding in *Devoll*.

Petitioner, in his construction business, used traditional "municipally sponsored debt instruments known as Industrial Revenue Bonds (IRBs)." Br. in Opp. 2. The banks' funds were indisputably never at risk, because the banks merely served as "the trustee banks for the bond proceeds"; they "held the money and invested it in an interest-bearing account." *Id.* at 3. As the court of appeals explained, "[f]rom the interest earned on the proceeds, the investors were paid a set rate of return, and any *excess amounts, referred to as 'arbitrage,' could be used by the developer* for costs directly related to the project." Pet. App. 19a (emphasis added). The theory of the prosecution was thus that "[p]etitioner caused false invoices and certifications to be submitted to the trustee banks *to obtain arbitrage funds* for

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[4] The petitions in this case and No. 03-44, *Sabri* v. *United States* (involving bribery prosecutions under 18 U.S.C. § 666) present this Court with a unique opportunity to confront the recurring issues regarding the scope of federal criminal law in areas traditionally regulated by the states. See Pet. 19 n.10; Amicus Br. of National Ass'n of Criminal Defense Lawyers, *Sabri*, at 4. Both petitions will be considered by the Court at its October 10, 2003 cconference.

impermissible purposes." Br. in Opp. 4 (emphasis added). Petitioner was nonetheless convicted because a divided panel of the Seventh Circuit in this case expressly rejected the Fifth Circuit's holding in *United States* v. *Devoll*, 39 F.3d 575, 580 (1994), that individuals may be prosecuted for bank fraud under Section 1014 only for conduct involving lending activities. Pet. App. 19a (citation omitted); see also *United States* v. *Boren*, 278 F.3d 911, 916 (9th Cir. 2002) (recognizing that *Devoll* holds that Section 1014 applies "only to lending activities").

Given this explicit recognition, the government's various attempts to minimize the conflict lack merit. (The government's arguments on the merits fail for the reasons set forth in the petition.) *First*, the government says (at 11) that *Devoll* arose in the context of the defendant's argument "that the district court committed plain error in failing to instruct the jury that such a connection was an element of the offense." That is true, but irrelevant. As the government admits, "the court of appeals [in *Devoll*] *held* that the district court [in that case] had committed error, because 'section 1014 applies only to actions involving lending transactions.'" *Id.* at 11 (quoting 39 F.3d at 580) (emphasis added); see 39 F.3d at 580 ("We *hold* today that section 1014 relates only to lending activities by financial institutions") (emphasis added). The Fifth Circuit in *Devoll* simply applied that holding to further conclude that the jury instructions in that case were required to conform to the limits on Section 1014's scope. 39 F.3d at 579-80.

Second, the government asserts, with no rationale whatsoever, that the facts of petitioner's case are "peculiar." Br. in Opp. 12. This case would be dismissed *a fortiori* in the Fifth Circuit under *Devoll*, in which the defendant defrauded banks with numerous false statements that he intended to take over the banks and, as one consequence, acquired cars on bank drafts drawn on the banks. At least in *Devoll*, unlike this case, the banks' own funds were at risk.

Third, the government says that the *Devoll* opinion "suggests" that the Fifth Circuit "was principally concerned with avoiding Section 1014's application to 'fraud or false representations having nothing to do with financial transactions.'" Br. in Opp. 12 (quoting *Devoll*, 39 F.3d at 580). That quotation, however, simply states one of several reasons the Fifth Circuit held as it did, for that court recognized the almost limitless breadth of the government's theory (which the Seventh Circuit accepted in this case), that Section 1014 applies to essentially every misrepresentation to a bank. The government's suggestion (at 12) that the Fifth Circuit might limit *Devoll* to "fraud in an employment contract" or contracts for "custodial care, premises repair, or renovation" is transparently silly in light of the facts of *Devoll* itself, which involved nothing of the kind.

Fourth, the government says (at 12) that there has not been a case in which "a court of appeals has reversed a conviction or affirmed the dismissal of an indictment" under *Devoll*. But as the petition stated, there are no further holdings applying *Devoll* for the simple reason that the government in that circuit is forbidden from bringing Section 1014 prosecutions outside the context of lending transactions by financial institutions. Pet. 8-9, 19. Indeed, the government is unable to point to a single indictment it has brought in the Fifth Circuit applying the theory it employed in this case.

Fifth, the government admits that neither bank was "itself the lender," yet asserts that it could have prosecuted petitioner consistent with *Devoll* because this case "does involve borrowed funds (*i.e.*, funds that were borrowed from the issuers of the IRBs)." Br. in Opp. 12. But this is a *bank* fraud prosecution, not a generic fraud prosecution. The Fifth Circuit "hold[s] * * * that section 1014 relates only to lending activities *by financial institutions*" (39 F.3d at 580 (emphasis added)), which would be the end of the matter in that court of appeals.

Sixth, the government asserts (at 12) that, although neither bank was "itself the lender," each "took on financial exposure for improper release of the funds." This argument is a *non sequitur* because the banks' supposed "financial exposure" does not trigger the statute. The banks in *Devoll* faced the financial exposure of paying for the cars delivered to the defendant based on drafts from the banks.[5]

In any case, the government's newfound claim is also outrageous because it persuaded the district court to instruct the jury that "it makes no difference that * * * the bond holders * * * may have had civil remedies in the event of a default" or "whose money it was that was being disbursed" or "whether or not the bank was injured." Aug. 24, 1995 Tr. 2. The trial evidence established that the banks were *insulated* from liability. The trust documents immunize the banks for "acting upon any" disbursement request "believed to be genuine." Indenture of Trust 67 (Sept. 1, 1987). The one witness quoted by the government (at 10) admitted that, "under the terms of the bond documents," "the trustee [is] entitled to rely on the contractor's representations that are contained in the disbursement certificate and requisition." Aug. 25, 1995 Tr. 570-71. A trustee's obligation is to act in good faith; given that the premise of this prosecution is that the trustees were defrauded, they couldn't possibly be held liable. *E.g.*, *NC Ill. Trust Co. v. First Illini Bancorp.*, 752 N.E.2d 1167, 1176 (Ill. App. 2001) (in case alleging breach of trustee bank's duties, "[t]he presence of good faith and common prudence necessarily dictates the absence of a breach of fiduciary duty").

CONCLUSION

The petition for certiorari should be granted.

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[5] As a separate matter, the banks had no financial exposure for the loss of the bonds' tax status because the IRS ruled, *for reasons entirely unrelated to this case*, that the bonds were not tax-exempt.

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No. 03-16

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING

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RULE 29.6 STATEMENT

Petitioner Robert R. Krilich, Sr. is a private party.

PETITION FOR REHEARING

On October 14, 2003, this Court issued an Order denying the petition for a writ of certiorari filed by petitioner Robert R. Krilich, Sr. On the same day, this Court granted certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit in No. 03-44, *Sabri* v. *United States*. Because of the close relationship between the second Question Presented in petitioner's case and the Question Presented in *Sabri*, petitioner respectfully requests that this Court hold this rehearing petition pending the decision in *Sabri* and then dispose of it as appropriate. Because petitioner stands convicted and imprisoned, no prejudice to the government could result.

BACKGROUND

18 U.S.C. 1014, entitled "Loan and credit applications generally," makes it a crime to "knowingly make[ ] any false statement or report * * * for the purpose of influencing in any way the action of * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." Petitioner was convicted of conspiracy to violate Section 1014 in connection with his withdrawal of funds – raised from the sale of Industrial Revenue Bonds to third parties to finance petitioner's construction of housing developments – held in trust by various banks.

On appeal, the Seventh Circuit acknowledged that petitioner's withdrawal of the trust funds were not "lending transactions," but it nonetheless held that Section 1014 criminalized petitioner's conduct. Indeed, the decision below effectively extended Section 1014 to encompass virtually any "false statement" to a banking institution, notwithstanding that state law also proscribes fraud on a trust. On that view, no federally insured funds, *and thus no particular nexus to a federal interest*, need be shown to establish a violation of

Section 1014. In so holding, the Seventh Circuit explicitly declined to follow the Fifth Circuit's contrary holding in *United States* v. *Devoll*, 39 F.3d 575 (1994), cert. denied, 514 U.S. 1067 (1995), that Section 1014 "applies only to statements made to obtain loans or other extensions of credit." Judge Ripple dissented with regard to Section 1014, agreeing with the Fifth Circuit that the statute "applies only to *lending activities* by the financial institutions protected by the statute." Pet. App. 27a (emphasis added).

ARGUMENT

In No. 03-44, *Sabri* v. *United States*, the petitioner was indicted in federal district court in Minnesota on charges that he allegedly bribed a local government official. Petitioner was charged under 18 U.S.C. 666, which criminalizes bribery with regard to state or local governments when such governments receive federal funding; like the law of every other state, Minnesota law also criminalizes bribery. Agreeing with the Fifth, Sixth, and Seventh Circuits, but in conflict with the Second and Third Circuits, the Eighth Circuit held that Section 666 does not require an indictment to allege any relationship between the alleged bribe and the federal funding. 326 F.3d 937, 939-940 (2003). Moreover, the court held, the Necessary and Proper Clause empowered Congress to enact Section 666 because the statute was "rationally related" to "achieving the efficacious expenditure of federal funds" "by policing the integrity of the entire organization that receives federal benefits." *Id.* at 950. Explaining that this Court's decisions in *Printz* v. *United States*, 521 U.S. 898 (1997), and *Alden* v. *Maine*, 527 U.S. 706 (1999), "teach us that * * * [f]ederal laws that usurp the traditional domain of state authority are * * * not 'proper,'" Judge Bye dissented from the panel's holding with regard to the Necessary and Proper Clause. *Id.* at 954-957.

Although petitioner's case presents the issue of the proper construction of Section 1014, relating to false statements to

financial institutions, while the proper construction of Section 666, relating to bribery, is at issue in *Sabri*, both cases present the same frequently recurring question of fundamental importance – *viz.*, the proper scope of federal criminal law in areas traditionally regulated by the states. Indeed, the construction of each statute revolves around the same basic inquiry: whether a statute expressly intended to protect a federal interest should criminalize conduct that is properly chargeable under state law and has *no* impact on the federal interest at stake. (At trial, the district court instructed the jury that it "makes no difference whose money it was that was being disbursed by the bank. And it makes no difference whether or not the bank was injured as a result of any conduct of the defendant or anyone else." Tr. 151. On remand, petitioner would be able to demonstrate that no federal bank funds were at risk. See Reply Br. at 7-8.)

In particular, if this Court rules for the defendant in *Sabri*, it likely will do so on the basis of a canon of construction that if Congress intends to extend the reach of federal criminal law into the traditional domain of the states, and specifically into a domain in which there is no distinct federal interest, Congress must do so expressly. Such a "plain statement" rule would have considerable consequences for petitioner in this case, as it would likely cause the Seventh Circuit to re-evaluate its divided panel opinion. Neither Section 666 (at issue in *Sabri*) nor Section 1014 (at issue in petitioner's case) contains a clear statement of an intent by Congress to reach conduct that presents no direct federal interest. Indeed, that is precisely the ground on which the Fifth Circuit in *Devoll* adopted its contrary construction of Section 1014. 39 F.3d at 580.

This case accordingly presents the rare circumstance in which rehearing may be appropriate. The Court has confronted a number of cases in which it has denied certiorari but a subsequent merits ruling calls the court of appeals' judgment into question. The Court's practice in such cir-

cumstances is to grant rehearing, vacate the order denying certiorari, vacate the court of appeals' judgment, and remand the case for further consideration. See *Friend* v. *United States*, 517 U.S. 1152 (1996); *Fuentes* v. *United States*, 516 U.S. 1022 (1995); *Adams* v. *Evatt*, 511 U.S. 1001 (1994); *Hitchcock* v. *Florida*, 505 U.S. 1215 (1992); *Booker* v. *Mississippi*, 472 U.S. 1023 (1985); *Simmons* v. *Sea-Land Services, Inc.*, 462 U.S. 1114 (1983); *Florida* v. *Rodriguez*, 461 U.S. 940 (1983); *Harris* v. *Reederei*, 451 U.S. 965 (1981).

CONCLUSION

The petition for rehearing should be held pending the disposition of No. 03-44, *Sabri* v. *United States*, and then disposed of accordingly.

Respectfully submitted.

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NOVEMBER 2003

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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Counsel for Petitioner